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No. _____

IN THE

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg & Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Do federal laws and policies to improve Indian education and promote Indian self-determination preempt New Mexico's Gross Receipts and Compensating Tax Act, §§7-9-1 to 7-9-81, N.M.S.A., 1978, and ancillary State laws, where the tax has nominally been assessed on the proceeds of a non-Indian contractor for work performed on an Indian-owned, federally-funded Indian school construction project located on Navajo Reservation trust

lands in New Mexico under a series of discrete Congressional appropriations to a tribal school board, which sustained the entire economic burden of the tax?

2. Is the tax repugnant to the Constitution, laws, and treaties of the United States because it impermissibly interferes with the ability and right of Navajo Indians to make their own laws and be governed by them?

3. Is the tax repugnant to the Constitution, laws and treaties of the United States because it conflicts with the Indian Trader Statutes, 25 U.S.C. §§261-264 and implementing regulations, 25 C.F.R. Part 252; with 25 U.S.C. §465; with the State's constitutional disclaimer of jurisdiction, New Mexico Constitution, Article XXI, §2, and Enabling Act, §2(B), 36 Stat. 558-559; and with Article 6 of The Navajo Treaty of 1868, 15 Stat. 669?[1]

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1. Counsel is aware of Rule 28.1 regarding corporations as parties. Neither of the Appellants is owned by any parent company or companies, nor does either of them own a subsidiary company or companies or affiliates. The caption names all parties. Appellant Ramah Navajo School Board, Inc., is an organization of the Navajo Nation under 25 U.S.C. §450b(c) and was incorporated in 1970 as a means to receive federal funds by contract from the Bureau of Indian Affairs. See Statement of the Case, page 14.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico affirming the judgment for Appellee in the trial court is reported at 625 P. 2d 1225 (N.M. App. 1980), Appendix A. The opinion and order of the Court of Appeals of the State of New Mexico July 11, 1980, denying Appellants' petition for rehearing is unreported, Appendix B.

JURISDICTION

This is a civil action for recovery of State gross receipts taxes imposed on a non-Indian contractor on receipts from a federally-financed, Indian-owned school construction project on Navajo Reservation trust lands. The major claim presented throughout is that the tax cannot be imposed on the receipts from this project because it unavoidably burdens a tribal school and is thus preempted by federal policies, laws, regulations, a treaty, and various U.S. Constitutional provisions. The trial court rendered a decision and judgment dismissing the complaint, Appendices F & G, holding that the tax is not preempted by federal law and does not interfere with Navajo self-government. On July 1, 1980, the Court of Appeals of the State of New Mexico affirmed, denying a petition for rehearing on July 11, 1980. On August 14, 1980, the Supreme Court of the State of New Mexico granted a writ of certiorari, Appendix C, to review the decision of the Court of Appeals. The parties filed briefs on the merits and the Navajo Nation was allowed to file an *amicus curiae* brief in support of Appellants. The Supreme Court of the State of New Mexico quashed its writ of certiorari on its own motion on March 30, 1981 and the Court of Appeals, to whom the record was returned, issued its

mandate on April 1, 1981, now making its decision final, Appendices D & E. Appellants filed their notice of appeal to the United States Supreme Court in the Court of Appeals of the State of New Mexico, Appendix I, on May 11, 1981.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).[3]

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, §8, Clause 3; Article VI, Clause 2:

The Congress shall have Power. . . to

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2. Appellants filed an amended notice of appeal and proof of service in the Court of Appeals of the State of New Mexico on May 22, 1981, Appendix J. Comparable notices of appeal were filed and cross-filed in the Supreme Court of New Mexico and the Trial Court on May 11, 1981, May 22, 1981, and April 29, 1981.

3. Many of the precedents which Appellants rely upon in this appeal were cases reviewed by this Court on Appeal. *Warren Trading Post, Co., v. Arizona Tax Comm'n.* 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242 (1965), *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980). In the event the Court determines it does not have appellate jurisdiction, Appellants pray that the Court treat this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3) and 28 U.S.C. § 2103. The importance of the issues here in terms of Indian education and self-determination are compelling enough to justify the exercise of this Court's discretionary certiorari jurisdiction as was done in other Indian jurisdiction cases presenting different problems, e.g., *Williams v. Lee,* 358 U.S. 217 3 L.Ed. 2d 251, 79 S. Ct. 269 (1959).

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

This Constitution and the Laws of the United States which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

TREATY INVOLVED

The Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, concluded June 1, 1868; Ratification advised July 5, 1868; proclaimed August 12, 1868 (15 Stat. 669), Article 6:

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who shall reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than ten years.

STATUTES INVOLVED

1. The relevant portions of the New Mexico Gross Receipts and Compensating Tax Act, §7-9-1 through 7-9-81, N.M.S.A., 1978, and Municipal Gross Receipts Tax Act, §7-19-1 *et.seq.*, N.M.S.A., 1978, are reproduced in Appendix K.

2. The appropriation acts of Congress for construction of school facilities for the Ramah Navajos read in relevant part:

> *Public Law 93-120, 87 Stat. 431:*
> For construction, major repair and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services contract, $53,703,000 to remain available until expended. . . .
>
> *Public Law 93-245, 87 Stat. 1073.*
> Provided further, That $2,700,000 of the amount appropriated under this heading in the Department of the Interior and Related Agencies Appropriation Act, 1974, shall be available for assistance to the Ramah Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.
>
> *Public Law 93-404, 88 Stat. 810:*
> Provided further, That not to exceed $1,195,000 shall be available to assist the Ramah Navajo Board, Inc., including not to exceed $800,000 for construction of school facilities and not to exceed $395,000 for purchase of school equipment.

Public Law 94-165, 89 Stat. 985:
Provided further, That not to exceed $2,229,000 shall be available for assistance to the Ramah-Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.

Public Law 95-74, 91 Stat. 293:
Provided further, That not to exceed $2,062,000 shall be available for assistance to the Ramah-Navajo School Board, Incorporated, New Mexico, for the construction of an Instructional Media Center.

3. The relevant portions of the Indian Self-Determination Act, 25 U.S.C. §450-450n, and §452-458e Public Law 93-638, January 4, 1975, 88 Stat. 2203-2217, are reproduced in Appendix L.

4. 25 U.S.C. 2010, Public Law 95-561, Title XI, §1130, November 1, 1978, 92 Stat. 2321:

> It shall be the policy of the Bureau in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

5. The Johnson O'Malley Act 25 U.S.C. 452, April 16, 1934 c. 147, §1, 48 Stat. 596; June 4, 1936, c. 490, 49 Stat. 1458:

> The Secretary of the Interior is authorized, in his discretion, to enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distrees, of Indians in such State or Territory, through the

agencies of the State or Territory or of the corporations and organizations, herein before named and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance and social welfare, including relief of distress, of Indians in such State or Territory.

6. 25 U.S.C. 465, Act of June 18, 1934, c. 576 §5, 48 Stat. 985, in relevant part reads:

. . . .Title to any lands or rights acquired pursuant to §461, 462, 463, 464, 465, 466-470, 471-473, 474-475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

7. The relevant portions of the Indian Trader Statutes read:

25 U.S.C. 261, Aug. 15, 1876, c. 289, §*5, 19 Stat. 200.*

Power to appoint traders with Indians — The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

25 U.S.C. §262, March 3, 1901, c. 832, §1, 31 Stat. 1066; March 3, 1903, *c. 994, §10, 32 Stat. 1009.*

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of In-

dian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

8. The New Mexico Disclaimer of Jurisdiction Over Indian Lands, N.M. Const. Art. XXI, §2; Enabling Act, §2(B), June 20, 1910, 36 Stat. 558-559, is reproduced in Appendix M.

9. Relevant portions of the Snyder Act, 25 U.S.C. §13, Nov. 2, 1921, c. 115, 42 Stat. 208, are set out in Appendix N.

REGULATIONS INVOLVED

1. The relevant portions of the regulations implementing the Indian Self-Determination Act, *supra,* found at 25 C.F.R. Parts 271 and 274, are reproduced in Appendix O.

2. The relevant portions of the regulations implementing Title XI of Public Law 95-561, *supra,* found at 25 C.F.R. Part 31a, are reproduced in Appendix P.

3. The relevant portions of the regulations implementing the Indian Trader Statutues, *supra,* 25 C.F.R. Part 252, are reproduced in Appendix Q.

STATEMENT OF THE CASE

Appellant Ramah Navajo School Board, Inc., is a wholly Indian-owned and controlled tribal organization of the Navajo Nation under 25 U.S.C. §450b(c). The Appellant Lembke Construction Co., Inc., is a New Mexico for-profit corporation operating a building construction firm based in Albuquerque, New Mexico. In 1970 the Ramah Navajo Chapter, a tribal subdivision, organized the Board and authorized its incorporation as a New Mexico non-profit corporation, a precondition for receiving funds by

contract from the Bureau of Indian Affairs for the purpose of operating a school for Navajo children.[4]

The Board's school replaced a public high school which the State of New Mexico had closed in 1968. The new school allowed Navajo children to return to a community day school from the distant federal Indian boarding schools to which they had been sent after the public school closed. Though started as a high school, the Navajo school now enrolls approximately 450 Navajo elementary and high school children. Because the initial facilities used by the Board were inadequate, Congress appropriated funds in a series of enactments from 1972 through 1977 for the construction of new school facilities. These appropriations were unusual. They were directed specifically to the Board, which has legal title to the new facilities, the Interior Department serving primarily as a conduit for the funds. Each appropriation contained language providing that the monies were to be used "for the construction of school facilities" by the Ramah Navajo School Board Inc., or words to that effect. In Public Law 93-245, 87 Stat. 1073, Congress amended its original construction appropriation, Public Law 93-120, 87 Stat. 431, to make these points explicit.

The school facilities were to be, and in fact were, built on Navajo Reservation trust lands in then Valencia County (now Cibola County), New Mexico, leased to the Board by

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4. Until passage of The Indian Self-Determination Act, *supra*, in 1975, Ramah's contracts were issued under the authority of the Johnson O'Malley Act, 25 U.S.C. §452, which the BIA interpreted at the time to require State incorporation as a precondition for a contract. Since 1975, Ramah's operating contracts have been written under the authority of The Indian Self-Determination Act, *supra*, 25 U.S.C. §450f, which the BIA has interpreted not to require State incorporation.

the Navajo Tribe. The federal construction monies were disbursed through contracts between the Board and the Interior Department's Bureau of Indian Affairs obligating the Board to construct the facilities. The construction project began in 1974 with bids from construction firms in the area. Only two firms, both non-Indian owned, submitted bids and Appellant Lembke Construction Co., Inc., the low bidder, received the award of a subcontract (denominated a "contract" in the written instruments) to perform the labor and provide necessary materials. The subcontract was approved by the Bureau of Indian Affairs. When succeeding phases of construction were funded by Congress, the Board issued successive subcontracts to Lembke, also with the BIA's concurrence. By overseeing its prime contracts with the Board, the BIA also oversaw the contracts with Lembke.[5] Each contract with Lembke contained a provision under which the Board was required to reimburse Lembke for all taxes in the nature of sales taxes for which Lembke might be assessed on account of its work on this project. Both bidders had insisted on such a provision in their bids.

New Mexico levied its gross receipts tax, §§7-9-1 through 7-9-81, N.M.S.A., 1978, on Lembke's receipts from work on the Ramah Navajo school project. In turn, as called for in the contracts with Lembke, the Board reimbursed Lembke the full amount of the tax, some $232,000 by the date of the trial court's judgment. The Board thus sustained the entire burden of the tax and continues to sustain it (pending final disposition of this case). New Mexico's gross receipts tax, nominally denominated atransaction privilege tax,

5. The record does not show that Lembke was licensed under the Indian Trader regulations, 25 C.F.R. Part 252, but as noted, its involvement with this project was subject to on-going BIA supervision. *Compare, Central Machinery Co. v. Arizona Tax Comm'n, supra,* 65 L.Ed. 2d, at 689, n.4

is almost always passed on to consumers in this fashion and therefore operates more like a sales tax than an excise tax. This has been recognized by the Courts of New Mexico. *Evco v. Jones,* 81 N.M 724, 729, 472 P. 2d 987 (N.M. App. 1970), *rv'd on other grds.* at 409 U.S. 91, 34 L. Ed. 2d 325, 93 S. Ct. 349 (1972).

In significant part, the unavoidable tax burden imposed on the Navajo Board has prevented completion of the facilities. The Board still lacks planned classroom space, landscaping, permanent administrative offices and a permanent cafeteria among other facilities needs. Lembke is obligated to pay over to the Board the proceeds, if any, it may receive from this action. The Navajo Nation, which filed an *amicus curiae* brief in the Appellant's favor in the Supreme Court of the State of New Mexico, considers education to be one of its principal governmental services and has promoted and supported the Ramah Navajo School Board since its inception.

How the Federal Questions Were Presented —

After exhausting State administrative remedies, Appendix H, the Appellants commenced this action by filing a civil complaint in the District Court, First Judicial District, County of Santa Fe, State of New Mexico, for a refund of gross receipts taxes. The complaint alleged in part that "the tax constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States"; "the imposition of the tax in question violates New Mexico's Constitutional disclaimer of jurisdiction over Indian lands" (N.M. Const. Art. XXI, §2, 36 Stat. 558-559); and that "the Supremacy Clause, U.S. Constitution Art. VI, cl. 2, bars imposition of this tax because its collection burdens or interferes with a

clear federal policy and program for the education of Indian children".

The federal preemption issues were tried to the Court, which rendered a decision and judgment based on Findings of Fact and Conclusions of Law reproduced in Appendices F and G holding that the tax in question is valid because it does not interfere with "the right of Navajo Indians to make their own laws and be governed by them" and because the tax "is not prohibited by reason of the Supremacy Clause of the United States Constitution and the doctrine of preemption."[6]

Appellants appealed to the Court of Appeals of the State of New Mexico, arguing that the tax in question was preempted by federal law, including the Indian Trader Statutes, *supra.* and 25 U.S.C. §465.On July 1, 1980, the Court of Appeals affirmed the trial court's judgment, Appendix A. Appellants filed a petition for rehearing on the grounds that the Court of Appeals had not taken into account this Court's two decisions of last Term in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980); and *Central Machinery Co. v. Arizona State Tax Comm'n.,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980). On July 11, 1980, the Court of Appeals denied the petition for rehearing in an unpublished opinion reproduced in Appendix B.

Appellants then filed a petition for a writ of certiorari in the Supreme Court of the State of New Mexico, again raising the preemption issues presented in the courts below.

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6. A subsidiary Claim based on a statutory exemption was also decided against the Appellants. The statutory exemption claim is not a part of this appeal.

On August 14, 1980, the Supreme Court of the State of New Mexico granted the petition, Appendix C, but on March 30, 1981, after briefs on the merits had been filed by the parties and by the Navajo Nation as *amicus curiae,* the Supreme Court of the State of New Mexico quashed its writ as having been improvidently granted and returned the record to the Court of Appeals without opinion, Appendix D.

THE QUESTIONS ARE SUBSTANTIAL

1. This case involves a conflict between the taxing power of a State and a comprehensive scheme for the improvement of Indian education, a "major national goal", 25 U.S.C. §450a(c).

In 1969, the Senate Subcommittee on Indian Education referred to Indian Education as "a national tragedy - a national challenge". S. Rep. No. 91-501, 91st Cong., 1st Session. The Ramah Navajo School played a significant role as a model for subsequent reforms first introduced administratively, later codified in federal laws including the Self-determination Act. The central point of these reforms has been to provide Indian communities the means to control their children's education, an objective which the State tax involved here has directly and undeniably impeded. 25 U.S.C. 450(b)(3). See, e.g., President's Message to Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970); Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy", 56 Texas L. R. 1195 (1978).

To accomplish the national goal at Ramah and fulfill a longstanding treaty obligation under Article 6 of the Treaty of 1968, 15 Stat. 669, Congress earmarked funds to Appellant Ramah Navjo School Board, a tribal organization of

the Navajo Nation, for construction of new school facilites for Indian children. Each appropriation expressly identifies school facilities construction or the like as its purpose. New Mexico's tax directly prevents fullfillment of Congress' intention. The tax has diverted and, until this case is finally decided, continues to divert a substantial amount of resources from this unfinished project. School facilites planned and paid for by the Congress are still not fully available for Ramah Navajo children.

The tax is therefore in conflict with *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 65 L.Ed. 2d 665, 100 S. Ct. 2578 (1980), and *Central Machinery Co., v. Arizona State Tax Comm'n.,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980), which dealt with similar taxes imposed, nominally, on non-Indian businesses but affecting protected Indian economic activities. The undisputed principles undergirding those decisions were summarized by Mr Justice Marshall in *Bracker, supra,* 100 S. Ct., at 2583:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8, cl. 3. See *United States v. Wheeler, supra,* 435 U.S. at 322-323, 98 S.Ct., at 1085-1086. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n.,* 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965); *McClanahan v. Arizona State Tax Comm'n., supra.* Second, it may unlawfully infringe "on the right of reservation Indians to

> make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, 271 (1958). (additional citations and discussion omitted)

Because of pervasive federal regulation of the activities affected by the Arizona taxes involved in both cases and the absence of an overriding State interest in collecting the taxes, the Court held that the State statutes involved in each case could not be imposed nor the taxes collected.

The instant case is stronger than any of the earlier decisions. Here the futures of Indian children are directly affected. In previous decisions on issues of this kind only Indian economic interests and the federal government's desire to advance them were involved. For example, in *Warren Trading Post Co. v. Arizona Tax Comm'n.,* 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), a unanimous decision holding that Arizona's gross receipts tax could not be assessed on the earnings of a non-Indian trading post licensee because of conflict with the same comprehensive federal trader regulation scheme involved here, Indians were not even parties. Yet here, contrary to the Court of Appeals' opinion on rehearing, there is not just one federal regulatory scheme involved but two, covering both business activities and, most uniquely, Indian education and *school construction,* activities at least as comprehensively regulated by federal law as any other. See, e.g. 25 U.S.C. §§450-450n, 452-458e, 25 U.S.C. §13, 25 U.S.C. §§2001-2019, and implementing regulations, especially 25 C.F.R. Parts 271, 274, and 31a., representing only a portion of federal legislation on Indian education.

Thus, along with violating the federal regulations on business activities (which are stronger on the Navajo Reservation than those on most other reservations), and on school construction, the State tax here directly interferes

with the Navajos' statutorily protected right to maximize local control over educational programs, 25 U.S.C §2010, and take over control of federal educational programs, 25 U.S.C., §450a(c); directly infringes upon Navajo education treaty rights,Art. 6, Treaty of 1868, 15 Stat. 669; and directly impedes the exercise of Navajo self-government by interfering with a central prerequisite for meaningful execise of that function — an educated citizenry. *Brown v. Board of Education,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

2. The decision below deals only cursorily with the unique status of the Navajo Reservation in federal law, a status largely derived from the Navajo Treaty of 1868, Article 6 of which obligates the United States to furnish school houses for Navajo children. This Court unanimously recognized this special status when it stated in *Warren Trading Post Co., supra,* 380 U.S., at 690:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. *And in compliance with its treaty obligations* the Federal Government has provided for roads, *education,* and other services needed by the Indians. (Emphasis added)

This Court reemphasized the point in *McClanahan v. Arizona State Tax Comm'n, supra,* 411 U.S. 164, at 173, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), when it said, in the course of barring the imposition of a State income tax on a Navajo living and working on the Navajo Reservation:

> The beginning of our analysis must be with the Treaty which the United States Government entered with the Navajo Nation in 1868.[7]

The State of New Mexico has already diverted over $232,000 of the amount Congress has provided to fulfill an express Treaty commitment to build school houses for Navajos at Ramah and elsewhere. Instead of focusing on the Treaty provision, the decision below suggests that the tax is proper because none of the specific appropriations for this project expressly forbids it. Yet each of these enactments contains language expressing Congress' intent that the money be used by this Indian Board for the erection of school facilities. The necessary implication is that the money is not intended to pay taxes of this kind to the State of New Mexico. No express prohibition is needed. See, *White Mountain Apache Tribe, supra,* 100 S. Ct., at 2584. By treaty and direct appropriations, Congress forged a partnership with a remote Navajo community to improve its children's education. New Mexico's tax intrudes on this partnership and cannot be sanctioned.

In addition, the decision below fails to assess the impact of 25 U.S.C. §465 or the New Mexico Disclaimer of Jurisdiction over Indian lands, Enabling Act, §2(B), 36 Stat. 558-559, N.M. Const., Art. XXI, §2, either of which arguably disposes of this case. Instead, the decision below relies principally on *G.M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P. 2d 277 (N.M. App. 1976), and *Tiffany Const. Co. v. Bureau of Revenue,* 93 N.M.

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7. *McClanahan, supra,* 411 U.S., at 170, n. 6, states that *Warren Trading Post Co., supra,* cannot be restricted to cases involving Indian traders and: "It is thus unsurprising that this Court has interpreted the Navajo Treaty to preclude extension of state law — including state tax law — to Indians on the Navajo reservation", *Ibid,* at 175, citing *Warren, supra* and *Williams, supra.*

593, 603 P.2d. 332 (N.M. App. 1979); remanded ____U.S.____; reaffirmed ____N.M.____, ____State Bar Bulletin (June____, 1981), in which there was no Indian involvement; on *United States v. New Mexico,* 581 F. 2d 803 (10th Cir. 1978), which also did not deal with Indians; on *Washington v. Conf. Tribes of Colville Res.,* 447 U.S. 134, 65 L.Ed. 2d 10, 100 S. Ct. 2069 (1980), which dealt primarily with State versus tribal tax competition and the legality of an artificial tribal tax haven, neither of which is involved here; and on *Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967 (10th Cir. 1980), *reh. den.,* 625 F.2d 991,U.S. *certiorari denied,* ____U.S.____, 49 U.S. Law Week 3619, February 23, 1981, which did not deal with Navajos, education, or direct appropriations to an Indian school board in furtherance of "a major national goal".[8]

3. If allowed to stand, the decision below will effectively institute a different rule of taxation for Navajos living in New Mexico as compared with Arizona. Although the New Mexico tax involved here is identical in form to the Arizona taxes held invalid in *Warren Trading Post Co., supra,* (not even cited below); *White Mountain Apache Tribe, supra;* and *Central Machinery Co., supra,* the accident that a Navajo resides in the New Mexico portion of this vast reservation will mean that he must sustain the tax burden while his Navajo relatives in Arizona do not. As justification for this anomaly, the New Mexico Court of Appeals resorts to mechanical application of a discredited labeling test, ruling

8. *Mescalero* was an en banc decision upholding application of New Mexico's Gross Receipts Tax on a non-Indian building contractor of a tribal resort complex and housing on the Mescalero Apache Reservation. The decision is based entirely on the legal incidence of the tax, a mechanical test strongly attacked in dissents by Judges McKay and Doyle.See point 3 below.

that the sole fact that the "legal incidence" of New Mexico's tax nominally falls on a non-Indian renders the tax lawful.

The State Court's approach violates this Court's repeated strictures against such mechanical tests in cases of this sort. See, e.g., *White Mountain Apache Tribe, supra, 100 S. Ct., at 2584, and Central Machinery Co., supra,* 100 S. Ct., at 2595, footnote 3, where Mr. Justice Marshall expressly rejected the notion that a state's label could validate a state tax levied upon on-reservation transactions where that tax could "disturb and disarrange" a federal statutory plan to protect reservation Indians. See also *Washington v. Conf. Tribes of Colville, supra,* 100 S. Ct., at 2086. The Court requires that "particularized" inquiries be conducted examining "the relevant treaties and statutes in terms of the broad policies that underlie them and the notions of tribal sovereignty that have developed from historical traditions of tribal independence" and "the nature of the State, Federal, and tribal interests at stake". The examination is to determine whether, "in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe, supra,* 100 S. Ct., at 2584. The New Mexico Court of Appeals has manifestly failed to conduct such an examination here.

Finally, the decision below also neglects to deal fully with the Indian trader statutes and not at all with the special Navajo regulations thereunder, 25 U.S.C. §§261-264 and 25 C.F.R. Part 252. The statutes were found dispositive in *Central Machinery Co., supra,* which involved a one-time sale of farm equipment to a tribal enterprise by an off-reservation, unlicensed, non-Indian. Those facts are substantially weaker than those in this record involving a multi-year, multi-million dollar construction project supervised under contract by the Bureau of Indian Affairs. Hence, the Indian trader statutues would seem to apply here with even greater preemptive force.

Closer examination of these factors by the State Court would have revealed a federal and tribal interest to protect this Indian school construction project from State interference far in excess of the revenue-raising interest of New Mexico, an interest that necessarily shrank after the State's 1968 action cutting off State educational services to most Ramah Navajo high school children.

In short, the decision below fails to make the requisite "particularized" inquiry, neglects to examine fully the special status of the Navajo Nation and this project in federal law, and conflicts with several major precedents of this Court dealing with identical taxes assessed on the same reservation by the State of Arizona, thus tending towards a duality which would create different rules of taxation for the two largest segments of this tribe of approximately 150,000 people. The State's tax has thus "disturbed and disarranged the statutory plan Congress set up", *Warren Trading Post, supra,* 380 U.S., at 691, to improve Indian education at Ramah, regulate business activities on the Navajo Reservation, and promote Navajo tribal self-government. The decision below must therefore be reversed.

CONCLUSION

For these reasons the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, or summary reversal.

Respectfully Submitted:
MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg and Gross
Suite 40, Sena Plaza
P.O. Box 1447
Santa Fe, New Mexico 87501
Counsel for Appellants

June 1981.

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Plaintiffs - Appellants,

v. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

COURT OF APPEALS OF NEW MEXICO
FILED JUL - 1 1980
/s/ Susie M. Montoya Clerk

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY DONNELLY, Judge

MICHAEL P. GROSS
Santa Fe, New Mexico

RONALD J. VanAMBERG
SOLOMON, ROTH & VanAMBERG
Santa Fe, New Mexico Attorneys for Appellants

JEFF BINGAMAN, Attorney General
GERALD B. RICHARDSON, Assistant Attorney General, Taxation & Revenue Department
Santa Fe, New Mexico Attorneys for Appellee

OPINION

WOOD, Chief Judge

Lembke (Lembke Construction Company, Inc.) contracted with the School Board (Ramah Navajo School Board, Inc.) to build a school and related facilities on Indian land. The various contracts provided that Lembke was to pay New Mexico's gross receipts tax and Lembke has done so. Lembke and the School Board sued for a refund on these taxes. Section 7-1-26(A), N.M.S.A. 1978 (Repl. Pamph. 1979). Lembke has agreed to pay over to the School Board any rebate or recovery it might realize as a result of this suit for a refund. There is no issue as to proper parties. The trial court ruled in favor of the State, plaintiffs appeal. There are two issues: (1) the propriety of imposing the gross receipts tax and (2) the applicability of § 7-9-54, N.M.S.A. 1978.

Propriety of Imposing the Gross Receipts Tax

Lembke is in the business of general construction and contracting. Moneys received for this activity are "gross receipts" Section 7-9-3(F), N.M.S.A. 1978 (1979 Cum.Supp.). A tax is imposed on these gross receipts "[f]or the privilege of engaging in business . . . in New Mexico." Section 7-9-4, N.M.S.A. 1978 (1979 Cum.Supp.).

The School Board is a non-profit corporation, incorporated under New Mexico law. The School Board is entirely operated by members of the Ramah Navajo Chapter, which is a local unit of government of the Navajo Indian Tribe. For the limited purpose of entering contracts with or receiving grants from the Bureau of Indian Affairs, the School Board is a Navajo Tribal organization. 25 U.S.C. § 450b(c) (1979 Supp. Pamph.).

The Bureau of Indian Affairs contracted with the School

Board for actual construction of the school facilities; in turn, the School Board contracted with Lembke. All the construction money came from the federal government through specific congressional appropriations to the School Board.

There is no claim that New Mexico's gross receipts tax was directly imposed on the School Board; the tax was on the gross receipts of Lembke for the privilege of doing business. The contracts between the School Board and Lembke were cost-plus contracts. Pursuant to those contracts, the School Board paid Lembke an amount that included the tax and Lembke, in turn, paid the State. Thus the School Board has indirectly sustained the financial burden of the tax.

Lembke and the School Board challenge the imposition of the tax because the financial burden of the tax is on the School Board. We have held that the legal incidence of the gross receipts tax is upon one in the position of Lembke, *First Nat. Bank of Santa Fe v. Commissioner of Rev.*, 80 N.M. 699, 460 P.2d 64 (Ct.App. 1969); that a non-Indian, such as Lembke, is not exempt from state taxation because the receipts taxed were derived from activity on Indian land, *G. M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (Ct.App. 1976); *Tiffany Const. Co., Inc. v. Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1979); that federal law did not preempt imposition of the tax, *Shupe, supra;* that the tax did not infringe on the right of reservation Indians to make their own laws and be governed by them, *Shupe, supra;* and that New Mexico's disclaimer to all rights and title to Indian lands did not bar imposition of the tax, *Shupe,supra.*

Lembke and the School Board suggest that we disregard New Mexico decisions, particularly the decision as to the in

cidence of the tax. Federal decisions have reached the same result as New Mexico. The legal incidence of the tax is on Lembke, the tax does not interfere with tribal self-government, the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax. See *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), aff'd by the 10th Circuit June 5, 1980 (Nos. 77-2102 and 77-2103).

Both federal decisions recognized the indirect burden of the tax was on the Indians but, nevertheless, sustained the New Mexico tax. In so doing, the 10th Circuit cited, with approval its decision in *United States v. State of N.M.,* 581 F.2d 803 (10th Cir. 1978) where there was a cost-plus contract, and where the indirect and ultimate burden of the tax was on the United States government. Here there is a cost-plus contract and the ultimate economic burden was on the School Board. The federal district court decision recognized that the indirect burden reduced the money that the Indians could spend, but held this burden was not prohibited by decisions of the United States Supreme Court nor preempted by federal legislation.

Lembke and the School Board would distinguish the federal decisions on the basis that school facilities are involved and that school facilities require a different result. They refer us to provisions in the treaty with the Navajos whereby the federal government was to provide schools and to congressional appropriations for these particular school facilities. Our answer, suggested by *Washington v. Confederated Tribes of the Colville Indian Reservation,* ____U.S.____ (No. 78-630 decided June 10, 1980), is that the appropriations for these specific school facilities do not

show an intent to prohibit New Mexico from taxing the gross receipts of the non-Indian contractor who builds the school.

Lembke and the School Board also contend that New Mexico may not impose its gross receipts tax upon Lembke's receipts absent specific federal legislation authorizing the tax. This contention is based on the view in McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973) that absent express authority from Congress, a state may not tax Indians or Indian property. The application of the gross receipts tax to Lembke does not require express authority from Congress because the tax is not on Indians or Indian property. The tax is on Lembke's gross receipts; the fact the indirect burden of the tax is on the Indian School Board is not a basis for holding that express authority from Congress is required for its imposition.

The trial court correctly ruled that the tax was applicable to Lembke's gross receipts.

Applicability of Section 7-9-54, supra

Section 7-9-54, supra, provides:

> Receipts from selling tangible personal property . . . to the governing body of an Indian tribe . . . for use on Indian reservations . . . may be deducted from gross receipts. That portion of the receipts from performing a service as defined in Subsection K of Section 7-9-3 NMSA 1978 which reflects the value of tangible personal property utilized or produced in performance of such service is not deductible.

Lembke and the School Board claim that Lembke was entitled to a deduction under § 7-9-54, supra, for Lembke's gross receipts based on the cost of materials and other tangi

ble property used in construction of the school facilities.

They contend that the School Board really purchased such items. Their theory is that when Lembke purchased such items, it purchased them as agent of the School Board. The trial court found that, under the contracts, Lembke was required to purchase and pay for such items; that Lembke purchased such items in its own name and paid for them; that Lembke had no authority to and did not pledge the credit of the School Board or the Navajo Tribe; that the School Board was never a disclosed purchaser of such items nor was the School Board billed for the items by the supplier and that title to such items, under the contracts, did not pass to the School Board until it paid Lembke. These findings are supported by substantial evidence; these findings support the conclusion that Lembke did not act as agent for the School Board in purchasing materials for the construction project. Contrast the federal district court decision in *Mescalero Apache Tribe v. O'Cheskey, supra.*

Lembke and the School Board contend that if Lembke did not purchase materials as agent for the School Board, then Lembke sold the materials to the School Board and, having sold the materials, Lembke performed no service and therefore there should have been a deduction for materials sold. This argument disregards the finding, supported by substantial evidence, that Lembke was not in the business of selling construction materials and only sells construction materials as part of a construction project in which the materials have been incorporated.

The applicable portion of § 7-9-3(K), supra, reads:

> "Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project.

This statutory provision answers the claim that Lembke provided no "service". Inasmuch as the tangible materials included within the construction project were part of Lembke's service, the last sentence in § 7-9-54, supra, quoted above, applies and there was no deduction.

Lembke and the School Board also claim a deduction on the basis of another provision in § 7-9-3(K), supra. This provision states:

> [S]ales of tangible personal property that will become an ingredient or component part of a construction project *to persons engaged in the construction business* are sales of tangible personal property[.] (Our emphasis.)

The claim is that the School Board was engaged in the construction business and, therefore, was entitled to a deduction under § 7-9-54, supra.

The claim that the School Board was engaged in the construction business is spurious. The School Board's contract with the Bureau of Indian Affairs did name the School Board as the contractor; however, the School Board's contract with Lembke named Lembke as the contractor and the School Board as the owner. The School Board incorporated no tangible personal property into a construction project. The above-quoted provisions from § 7-9-3(K), supra, refer to persons engaged in construction, that is, building the building. Lembke built the building, the School Board did not.

The trial court properly denied a deduction under §

7-9-54, supra.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

/s/ Joe Wood
Chief Judge

WE CONCUR:

/s/ B. C. Hernandez

/s/ Leila Andrews

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Plaintiffs - Appellants,

v. No. 4302

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY DONNELLY, Judge

FILED
JUL - 11
1980
/s/ Susie M. Montoya
CLERK

MICHAEL P. GROSS
Santa Fe, New Mexico
RONALD J. VanAMBERG
SOLOMON, ROTH & VanAMBERG
Santa Fe, New Mexico Attorneys for Appellants

JEFF BINGAMAN, Attorney General
GERALD B. RICHARDSON, Assistant Attorney General, Taxation & Revenue Department
Santa Fe, New Mexico Attorneys for Apellee

ON MOTION FOR REHEARING

Lembke and the School Board moved for rehearing, contending that two recent decisions of the United States Supreme Court "effectively overrule the principal precedent relied upon by this Court in its decision, *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), affirmed by the 10th Circuit June 5, 1980." We disagree.

White Mountain Apache Tribe v. Bracker, No. 78-1177, decided June 27, 1980, 48 U.S.L.W. 4897, involved the application of Arizona's motor carrier license tax and Arizona's use fuel tax to the activities of a non-Indian logging company operating solely on the reservation. *White Mountain* held that detailed and comprehensive federal regulation of the harvesting of Indian timber, and detailed regulation governing roads developed by the Bureau of Indian Affairs showed "that the federal regulatory scheme is so pervasive as to preclude" application of the two taxes. "There is no room for these taxes in the comprehensive federal regulatory scheme."

Central Machinery Company v. Arizona State Tax Commission, No. 78-1604, decided June 27, 1980, 48 U.S.L.W. 4904, involved the application of Arizona's transaction privilege tax to the sale of tractors to the Indian Tribe. *Central Machinery* held: "Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax."

Our case does not involve a comprehensive or pervasive scheme of federal regulation of the construction of a school nor does it involve federal regulation similar to the Indian trader statutes. Neither *White Mountain, supra,* nor *Central Machinery, supra,* overrule the *Mescalero Apache Tribe, supra,* decisions on which we rely.

We note that footnote 15 in *White Mountain* states:

"[T]he fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted . . . ." This supports our decision.

The motion for rehearing is denied.

/s/ Joe W. Wood
Chief Judge

/s/ B.C. Hernandez
Judge

/s/ Leila Andrews
Judge

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Thursday, August 14, 1980

No. 13,230

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners

vs. **Original Proceeding on Certiorari**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari shall issue from this court as prayed for in the petition.

ATTEST: A TRUE COPY

/s/Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners **No. 13,230**

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent

WRIT OF CERTIORARI

THE STATE OF NEW MEXICO

TO: Court of Appeals
Santa Fe, New Mexico

GREETING:

WHEREAS, the Petitioners, through their attorneys, Michael P. Gross and Solomon, Roth & VanAmberg, Ronald J. VanAmberg, Santa Fe, New Mexico, did apply to this Court on July 29, 1980 for its review of the Decision handed down by the Court of Appeals on July 11, 1980 in Cause No. 4302 entitled The Ramah Navajo School Board, et al vs. Bureau of Revenue; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on July 29, 1980, in compliance with Rule 28(f) of the Rules of Appellate Procedure for Civil Cases, that an

application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been served on Respondent in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby issued and the Court of Appeals is hereby ordered to proceed no further in Cause No. 4302 pending the further Order of this Court.

WITNESS, The Honorable Dan Sosa, Jr., Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of August, 1980.

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Monday, March 30, 1981

No. 13,230

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners

vs. **Original Proceeding on Certiorari**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent

This matter having heretofore been submitted and taken under advisement, and a writ of certiorari having issued on August 14, 1980;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on August 14, 1980, be and the same is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 4302 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST A TRUE COPY
/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No 4302

RAMAH NAVAJO SCHOOL BOARD, Apellants
INC., et al

SANTA FE County
BUREAU OF REVENUE Appellee **No. 78-438**

MANDATE
TO: DISTRICT COURT CLERK
(Applicable items are indicated by an "X" below.)

1. X — Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. X — This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. _____ — Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceeding consistent with said Supreme Court decision attached hereto.

4. _____ — You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. _____ — Cost Bill is assesed as follows:

6. _____ District Court Clerk's Record returned herewith.

7. X Exhibits filed herein shall be picked up at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 1st day of April, 1981.

(SEAL)
cc: Counsel

/s/ Susan W. Bagwell
Clerk of the Court of Appeals of the State of New Mexico

(Tear off and return this receipt)

No. 4302

RECEIPT IS ACKNOWLEDGED of the original mandate and Clerk's Record.

Dated: _____

_____
Clerk of the District Court

ATTEST: A true copy
Clerk of the Court of Appeals
of the State of New Mexico
/s/ Nancy C. Lopez Deputy

APPENDIX F

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO COUNTY OF SANTA FE

RAMAH NAVAJO SCHOOL BOARD, INC., and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs,

vs.

No. SF 78-438 (C)

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant.

DECISION OF THE COURT

The Court having heard the evidence and the testimony and the arguments of Counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision:

FINDINGS OF FACT

1. The Plaintiff, Ramah Navajo School Board, Inc., is a non-profit corporation incorporated under the laws of the State of New Mexico, entirely operated by members of the Ramah Navajo Chapter, a local unit of government of the Navajo Indian Tribe, and which Ramah Navajo Chapter is located within the Ramah Navajo Indian Reservation in Valencia and McKinley counties, New Mexico.

2. The Plaintiff, Lembke Construction Co., Inc., is a New Mexico corporation, properly licensed by the State of New Mexico, and whose principal business is general construction and contracting.

3. The Defendant, Bureau of Revenue, State of New Mexico, is a governmental agency of the State of New Mexico, and is charged by law with the administration of the Tax Administration Act, and the assessment and collection of taxes, including taxes imposed under the Gross Receipts and Compensating Tax Act of the State of New Mexico.

4. The Plaintiff School Board's affairs are managed by a Board of Trustees elected by members of the Ramah Navajo Chapter and all members of said Ramah Navajo School Board, Inc. are enrolled members of the Navajo Indian Tribe.

5. The Plaintiff School Board corporation operates programs and projects primarily in the field of education for the benefit of the Ramah Navajo Indians located on the Ramah Navajo Reservation. The Ramah Navajo Reservation is situated approximately 35 miles southeast of Gallup, New Mexico, and occupies a territory of approximately 1,000 square miles and occupied by about 2,000 Navajos.

6. The Plaintiff School Board corporation is a Navajo Tribal organization within the meaning of 25 U.S.C., Sec. 440 b(c) for the limited purpose of entering into contracts with or receiving grants from the Bureau of Indian Affairs, but the said School Board is not part of or equivalent to the governing body of the Navajo Indian Tribe.

7. In 1973, the Bureau of Indian Affairs contracted with the Plaintiff School Board for the design of new school facilities, and in 1974, contracted with the School Board for actual construction of school facilities, pursuant to specific

congressional appropriations solicited by and made to the Ramah Navajo School Board.

8. All of the money with which the Plaintiff Ramah Navajo School Board facilities were constructed and continue to be constructed with, come from the federal government through spcific congressional appropriations to the School Board under P.L. 92-369, P.L. 93-120, P.L. 93-245, P.L. 93-404, P.L. 94-165, and P.L. 97-74. In order to obtain these appropriations, members of the Plaintiff School Board testified before congress on many occasions to justify their need for these monies. Navajo Tribal monies were not used to construct the new school facilities.

9. The Navajo Tribe, acting through its tribal council, has authorized and continues to authorize the Plaintiff School Board to contract with the Bureau of Indian Affairs, pursuant to P.L. 93-638, for monies to operate the Ramah Navajo School facilities.

10. The new educational facilities built for use by the Plaintiff School Board, are located exclusively on Navajo trust land leased to the School Board for educational uses and purposes. The contracts between the Bureau of Indian Affairs and the School Board designate the Ramah Navajo School Board as the design and building contractor. The initial contract for construction vests title to the educational facilities in the School Board.

11. The Plaintiff, Lembke Construction Company, Inc., is a non-Indian corporate entity, and it entered into a subcontract with the School Board to construct a school complex and related facilities in fulfillment of the School Board's obligations to the United States under its contracts with the Bureau of Indian Affairs.

12. The construction contracts between the Plaintiff, Lembke Construction Company, Inc., and the Plaintiff

School Board require that Lembke pay the New Mexico taxes required by law. Section 4.6.1 of the Standard Form of Agreement between owner and contractor and wherein the owner is Ramah Navajo School Board, Inc. and the contractor is Lembke Construction Company, Inc., provides:

> "4.6.1 The contractor shall pay all sales, consumer use and other similar taxes required by law."

13. Since entering into contracts to build facilities for Plaintiff School Board, Lembke Construction Company, Incorporated has been paying and continues to pay the New Mexico gross receipts tax to Defendant Bureau of Revenue on its receipts from the school construction project. Lembke's bids or cost estimates have always included, as a part of the cost to the Plaintiff School Board, the cost of the gross receipts tax.

14. At the inception of the building of school facilities for the Plaintiff School Board, there were two bidders for construction of the project, and both bidders included New Mexico gross receipts tax in their jobs.

15. Seciton 1 Y of the general requirements attached to the invitation for bids for the Ramah Navajo School Construction project informs bidders, including the Plaintiff, Lembke Construction, Company, Inc., that they must comply with the New Mexico "sales and use tax laws".

16. The Plaintiff School Board has no direct liability to the Bureau of Revenue for gross receipts taxes arising from the construction of the Ramah School facilities. However, pursuant to its agreement with Plaintiff Lembke Construction Company, Inc., the said contractor has passed on this tax to the School Board, which has thus indirectly sustained the financial burden of the tax.

17. The Defendant's exhibits F through N, attached to the affidavit of Jan Unna filed in support of Defendant's motion for Summary Judgment, represent typical subcontracts, materials contracts, invoices, non-taxable transaction certificates, and payments to materials suppliers and subcontractors of Lembke Construction project. These documents represent the typical manner in which materials were purchased, invoiced and paid for by Lembke on the Ramah School Construction project. The procedures reflected in these documents for the Ramah School project represent the standard practice of Lembke in handling these matters in other construction projects which occur off of any Indian reservation.

18. To date, Plaintiff Lembke Construction Company has paid the Bureau of Revenue the total sum of $232,264.38 on its gross receipts derived from the construction of educational facilities for the School Board, all of which payments have been reimbursed by the School Board from the federal funds allocated to this project under the congressional appropriations mentioned in Finding of Fact No. 8, *supra*.

19. The Plaintiffs have brought this action pursuant to Sec. 7-1-26 N.M.S.A., 1978 Comp. (formerly Sec. 72-13-40 N.M.S.A., 1953 Comp.) in order to claim a refund of gross receipts taxes paid by Lembke Construction Company, Inc., attributable to its receipts from construction contracts between the Plaintiff School Board and Plaintiff Lembke Construction Company, Inc., through the date of trial.

20. The Plaintiff, Lembke Construction Company, Inc., has agreed to pay the School Board any rebate or recovery it might realize as a result of this action.

School Board, expressly designate Lembke as an agent for any purpose.

22. The Plaintiff, Lembke Construction has exhausted its administrative remedies under the Tax Administration Act, however, the architects and engineers, West and Hirschen, Gammill, Trumbo and Cook, are not parties to the suit and have not exhausted their administrative remedies and there are no specific financial figures attributable to the gross receipts paid by them.

23. Education is one of the several functions of the Navajo Tribal government. Other typical functions of Navajo Tribal government include such areas as: Law Enforcement and Police Power; Road Construction, Repair and Maintenance; Economic Development; Housing; Resources Management; Health Care; and Social Welfare.

24. Approximately 450 Ramah Navajos attend the Pine Hill Schools, operated by the Plaintiff School Board for students in grades kindergarten through 12. Approximately 35 Ramah Navajos attend Zuni High School at Zuni, New Mexico. Zuni High School is part of the New Mexico public school system operated by the Gallup-McKinley County school system. The State of New Mexico Education Department provides bus service solely within McKinley County for those students from Ramah Village to Zuni High School and back.

25. In 1973, the Bureau of Indian Affairs contracted with the Plaintiff School Board for the design of new school facilities, and in 1974, contracted with the Plaintiff School Board for actual construction of the school facilities, pursuant to specific congressional financial appropriations solicited by and made to the Plaintiff School Board. The contracts between the Bureau of Indian Affairs and the School Board designate the Plaintiff School Board as the

design and building contractor for the purpose of getting the school facility built, however, the Plaintiff School Board did not do the actual construction work or design work on the project itself, and it contracted with the Plaintiff Lembke and two architectural firms, Hirschen, Gammill, Trumbo and Cook, and Architects-Engineers, West.

26. There is no allegation in the Plaintiffs' Amended Complaint that the Plaintiff School Board is engaged in the construction business or in the business of providing architectural services.

27. The Plaintiff, Lembke Construction Company, Inc., had done all the actual construction work on the Plaintiff's school facilities pursuant to contracts between the two plaintiffs.

28. The Plaintiff School Board has no direct liability to the State of New Mexico, Bureau of Revenue, for any payment of gross receipts taxes arising from the construction of the Plaintiff's school facilities.

29. The Plaintiff, Lembke Construction Company, Inc., does derive gross receipts from its contract with the Plaintiff School Board for the construction of the school, and has self-assessed gross receipts taxes throughout the course of the construction project. Under its contracts with the Plaintiff School Board, the Plaintiff Lembke has passed on the cost of the gross receipts tax that it pays to the Bureau of Revenue to the Plaintiff School Board as a cost of the project for which the School Board reimburses Lembke.

30. The Plaintiff Lembke Construction Company, Inc., is required to purchase and pay for all materials necessary for the school construcion project.

31. In purchasing the materials for the school project, the Plaintiff, Lembke Construction Company, Inc., purchased the materials in its own name and was billed for

those materials in its own name.

32. In none of the contracts between the Plaintiff, Lembke and the Plaintiff School Board, Lembke was not given any written or implied authority to pledge the credit of the School Board or the Navajo Tribe.

33. In purchasing materials for the Plaintiff School Board's construction projects, Lembke did not pledge the credit of the School Board or the Navajo Tribe.

34. The Plaintiff School Board was never a disclosed purchaser of materials for the Ramah School Construction project, nor was the School Board billed for materials incorporated in the Ramah School Construction project.

35. As specified in the terms of the contracts between the Plaintiff, Lembke Construction Company, Inc., and the Plaintiff School Board, title to the materials used in the school construcion project does not pass to the school board until the Plaintiff Lembke receives payments for those materials in the form of a progress payment from the School Board.

36. The written contracts entered into between the Plaintiffs provide in their terms that Lembke Construction Company, Inc. makes a profit on the materials which it incorporates into the school construction project.

37. The Plaintiff Lembke Construction Company, Inc., is not in the business of selling construction materials at retail and it only sells construction materials as part of a construction project in which the materials are incorporated.

38. In the contracts between the Bureau of Indian Affairs and the School Board, there is no language designating the School Board as an agent of the Bureau of Indian Affairs for any purposes.

39. To date, Lembke Construction Company has paid

the Bureau of Revenue the total sum of $232,364.38 on its gross receipts derived from the construction of educational facilities for the School Board, all of which payments have been reimbursed by the School Board to Lembke. There is no specific dollar amount attributable to gross receipts taxes paid by Lembke on the sale of construction materials for the Ramah School project to the School Board.

40. P.L. 93-638 contemplates State participation in Indian education.

41. Title 10 of the Navajo Tribal Code contemplates State participation in Indian education.

42. The Ramah Navajo School Board has been operating schools for the benefit of Ramah Indians since 1970.

43. Since 1975 the School Board has been providing education to Ramah Navajo Indians in its own school facilities. It has continued to educate Ramah Indian students even though it has reimbursed Lembke for the gross receipts taxes Lembke paid the Bureau of Revenue on its receipts from the Ramah School project.

44. There is no language in the congressional appropriations of money to the Ramah Navajo School Board prohibiting the imposition of State taxes on the construction activities to build the Ramah School facilities.

45. The gross receipts tax which Lembke Construction Company has been paying is imposed on Lembke Construction Company and not upon Indians, tribal organizations or Indian lands. The activities of Lembke which are being taxed are its construction activities. Educational activities by the School Board are not being taxed by the New Mexico gross receipts tax.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and the subject matter hereof.

2. The Plaintiffs, Lembke Construction Company, Inc., and Ramah Navajo School Board, Inc., have sought a refund of gross receipts taxes both for themselves and for Hirschen, Gammill, Trumbo and Cook, and West, Architects-Engineers.

3. The legal incidence of New Mexico's gross receipts tax is on the seller of goods and services and not upon the purchaser.

4. The Plaintiff, Lembke Construction Company, Inc., is taxable under the New Mexico gross receipts tax and the monies it seeks to have refunded to it in this case as gross receipts were derived from selling construction services within New Mexico.

5. The gross receipts paid by the Plaintiff, Lembke Construction Company, Inc., as a non-Indian construction contractor from construction work performed on the Navajo Indian reservation and located in New Mexico, are fully taxable under the New Mexico Gross Receipts and Compensation Tax Act.

6. The Plaintiff School Board, as a purchaser of goods and services from Lembke Construction Company, Inc. is not itself taxable under the provisions of the New Mexico gross receipts tax even though the economic burden of the gross receipts tax may be passed on to the purchaser by the seller.

7. The imposition of the New Mexico gross receipts tax on Lembke Construction Company, Inc. does not constitute an unlawful interference with the right of the Plaintiff School Board to operate its school facilities, or the right of

the Navajo Indians to make their own laws and be governed by them.

8. The imposition of the New Mexico gross receipts tax on the receipts of the Plaintiff, Lembke Construction Company, Inc. for performing construction services for the Plaintiff School Board on the Navajo reservation within the State of New Mexico, is not prohibited by reason of the supremacy clause of the United States Constitution and the doctrine of preemption.

9. Imposition of New Mexico's gross receipts tax upon the receipts of the Plaintiff, Lembke, derived from construction activities performed on the Navajo Indian Reservation and within the State of New Mexico is not prohibited by the New Mexico constitutional disclaimer of jurisdiction over Indians in Indian lands, contained in Article XXI, Sec. 2, New Mexico constitution.

10. The Plaintiff, Lembke Construction Company, Inc., did not act as agent for the Ramah Navajo School Board when it purchased materials for the Ramah School Construction project.

11. The Plaintiff, Ramah Navajo School Board, Inc. did not act as purchasing agent for materials for the said School Construction project for either the Navajo Tribe or the United States of America.

12. The Plaintiff School Board was not engaged in the construction business in the building of the school project and it is not entitled to any exemption from the tax laws of New Mexico or which would warrant any refund of the gross receipts tax paid by Plaintiff, Lembke Construction Company, Inc.

13. The Plaintiff, Lembke Construction Company, Inc., is not entitled to claim the deduction specified in Sec. 7-9-54 N.M.S.A., 1978, for its gross receipts derived from

the Ramah School construction project attributable to construction materials incorporated in the Ramah School project.

14. The claim for refund by the Plaintiff for Hirschen, Gammill, Trumbo and Cook, and Architects-Engineers West, is not properly before the Court and said parties have not exhausted their administrative remedies and said claim should be dismissed.

15. The Plaintiffs, Ramah Navajo School Board, Inc. and Lembke Construction Company, Inc., have properly exhausted their administrative remedies as a prerequisite to the bringing of this action.

16. The claims of the Plaintiffs and each of them against the Defendant should be denied, and the Defendant, Bureau of Revenue, is entitled to judgment dismissing Plaintiff's Complaint.

Each of the Findings of Fact and Conclusions of Law, submitted by the parties hereto, which are not expressly adopted herein by the Court or which are inconsistent herewith, are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Thomas A. Donnelly
District Judge

CERTIFICATION
I HEREBY CERTIFY THAT A COPY OF
THE FOREGOING DECISION WAS MAILED
TO COUNSEL OF RECORD ON THE 27th
DAY OF AUGUST 1979
/s/ Helen M. Rael

APPENDIX G

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

RAMAH NAVAJO SCHOOL BOARD, INC., and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs,

vs. **No. SF 78-438 (C)**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant.

JUDGMENT

This action came on for trial before the Court, the Honorable Thomas A. Donnelly, District Judge, presiding, the Court having heard the testimony and the evidence presented by the parties and the issues having been duly tried, Findings of Fact and Conclusions of Law having been entered in which the issues were found in favor of Defendant Bureau of Revenue, and against Plaintiffs Ramah Navajo School Board, Inc., and Lembke Construction Company, Inc., and a decision having been duly rendered,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs take nothing against Defendant, that the action be dismissed on the merits, and that each party shall bear his own costs.

/s/ Thomas A. Donnelly
District Judge

Approved as to form
/s/ Michael P. Gross
Attorney for Plaintiffs

/s/ Ronald J. VanAmberg
Attorney for Plaintiffs

/s/ Gerald B. Richardson
Attorney for Plaintiffs

CERTIFICATION
I HEREBY CERTIFY THAT A COPY OF
THE FOREGOING JUDGEMENT WAS MAILED
TO COUNSEL OF RECORD ON THE 6th
DAY OF SEPTEMBER 1979
/s/ Helen M. Rael

APPENDIX H

State of New Mexico
BUREAU OF REVENUE
SANTA FE, NEW MEXICO
87503

AN EQUAL OPPORTUNITY EMPLOYER

Michael P. Gross, Esq.
Post Office Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501

FEB 07 '78

Lembke Construction Co., Inc.
Claim for Refund

Dear Mr. Gross:

As you of course know, we have received Lembke Construction Company's claim for refund and the informal discussion paper which you submitted at the time of the informal conference on January 6, 1978. We have also reviewed copies of Lembke's construction contracts submitted subsequent to the informal conference.

After consideration of the facts and arguments you have presented, Lembke Construction Co's claim for refund is denied. The gross receipts of a non-Indian contractor, such as Lembke, from performing construction services on a reservation in New Mexico is taxable. *Mescalero Apache Tribe v. O'Cheskey,* Case No. 76-171B D.N.M. Memorandum opinion October 19, 1977, on appeal Tenth Circuit

Court of Appeals No. 77-2103. See also *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (1976). If Lembke Construction Co. should decide to pursue its administration remedy pursuant to §72-13-38, N.M.S.A. 1963, Ramah Navajo School Board, Inc.'s motion to intervene will then be considered. There is no need to rule on that motion at this time.

Very truly yours,
/s/ Arthur Snead
Deputy Commissioner

AS/JU/ca

APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC.
and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. No. 4302

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ramah Navajo School Board, Inc., and Lembke Construction Co., Inc., Plaintiffs-Appellants in the above-style cause, appeal to the Supreme Court of the United States from the order of the Court of Appeals of the State of New Mexico entered July 1, 1980, affirming the judgment dismissing the action on the merits, petition for rehearing denied by the Court of Appeals of the State of New Mexico July 14, 1980; the Supreme Court of the State of New Mexico having quashed its previously granted writ of certiorari to the Court of Appeals of the State of New Mexico in this matter March 30, 1981.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

ROTH, VANAMBERG AND

MAY 11 1981

GROSS
BY:/s/ Michael P. Gross
Michael P. Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 11, 1981, I served true copies of the above appeal upon all counsel of record by depositing one (1) copy each in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
Michael P. Gross

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 11, 1981, I filed and served a notice of Appeal to the Supreme Court of the United States in the above-matter upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan B. Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
ROTH, VANAMBERG &
GROSS
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants
and local counsel for the
Amicus Curiae, Navajo Nation

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 14, 1981, I served the above amended certificate of service upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
Michael P. Gross

APPENDIX J

LAW OFFICES
ROTH, VAN AMBERG & GROSS
SUITE 40, SENA PLAZA
POST OFFICE BOX 1447
SANTA FE, NEW MEXICO 87501
505/983-7319 - 988-8979

May 22, 1981

Mrs. Susan W, Bagwell
Clerk,
Court of Appeals
State of New Mexico
P.O. Box 2008
Santa Fe, New Mexico 87501

Re: *Ramah Navajo School Board, Inc., et. al. v. Bureau of Revenue*
Court of Appeals No. 4302

Dear Mrs. Bagwell:

Enclosed for filing please find an Amended Notice of Appeal and Proof of Service to the United States Supreme Court in the above-styled matter.

Also enclosed for filing is a copy of Appellants' Notice of Appeal to the Supreme Court of the United States filed in the Supreme Court of the State of New Mexico May 11, 1981.

I understand the Court of Appeals is possessed of the record in this case except for exhibits which you previously directed

be picked up by counsel. Counsel have agreed to safeguard the exhibits pending this appeal.

I appreciate your cooperation.

Sincerely,
/s/ Michael P. Gross
MICHAEL P. GROSS

cc: Gerald B. Richardson, Esq.
Jan B. Unna, Esq.

COURT OF APPEALS
FILED
MAY 22 1981

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

AMENDED NOTICE OF APPEAL AND PROOF OF SERVICE

Please take notice that the Ramah Navajo School Board, Inc., and Lembke Construction Co., Inc., Planitiffs-Appellants in the above-styled cause, appeal to the Supreme Court of the United States from the order of the Court of Appeals of the State of New Mexico entered July 1, 1980, affirming the judgment of the District Court, First Judicial District, County of Santa Fe, State of New Mexico. dismissing this action on the merits, the Court of Appeals having denied Plaintiffs-Appellants' petition for rehearing July 11, 1980, and the Court of Appeals of the State of New Mexico having issued its mandate marking its decision as final on April 1, 1981 (following the quashing of a Writ of Certiorari to the Court of Apeals by the Supreme Court of the State of New Mexico March 30, 1981).

The appeal is taken pursuant to 28 U.S.C. §1257(2).

ROTH, VANAMBERG AND GROSS
BY:/s/ Michael P. Gross
Michael P. Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 22, 1981, I filed and served the above Ameded Notice of Appeal and Proof of Service in the above styled matter upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

and that I filed a true copy of the above Ameded Notice of Appeal and Proof of Service in the District Court, First Judicial District, County of Santa Fe, State of New Mexico, on the same date.

/s/ Michael P. Gross
Michael P. Gross

COURT OF APPEALS

FILED
MAY 22 1981

ORIGINAL PLEADING
FILED ON 5-22-81
SF COUNTY
DISTRICT COURT CLERK'S OFFICE

APPENDIX K

NEW MEXICO TAX STATUTES

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax."

A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

7-9-5. Presumption of taxability.

To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. Any person engaged solely in transactions specifically exempt under the provisions of the Gross Receipts and Compensating Tax Act shall not be required to register or file a return under this act.

7-19-8. Collection by bureau; distribution of proceeds; deductions.

A. The bureau [revenue division of the taxation and revenue department] shall collect the municipal gross receipts tax in the same manner and at the same time it collects the state gross receipts tax.

APPENDIX L

INDIAN SELF—DETERMINATION AND EDUCATION ASSISTANCE ACT OF 1975, PUBLIC LAW 93-638 88 STAT. 2203, 25 U.S.C. §§450 et. seq. (EXCERPTS)

INDIAN SELF-DETERMINATION [NEW]

§ 450. Congressional statement of findings

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that——

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that——

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

§ 450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

§§ 450b. INDIANS

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum partipation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

§ 450f. Contracts by Secretary of the Interior with tribal organizations— —Request by tribe for contract by Secretary to plan, conduct and administer education, etc., programs; refusal of request

(2) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934, as amended by this Act, any other program or portion thereof-which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921, and any Act subsequent thereto . . .

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as— —

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit

enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

§ 458. School construction, acquisition, or renovation contracts——Authorization; prerequisites

(a) The Secretary is authorized to enter into a contract or contracts with any State education agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian reservation or other lands held in trust by the United States for Indians, if such facilities are necessary for the education of Indians residing on any such reservation or lands.

Eligibility of private schools to receive funds; maximum amount

(c) The Secretary may expend not more than 25 per centum of such funds as may be authorized and appropriated pursuant to this section on any school eligible to receive funds under section 458d of this title.

§ 458d. Same; elegibility for funds of tribe or tribal organization controlling or managing private schools; report to Congressional Committees

The Secretary is authorized and directed to provide funds, pursuant to this Act; the Act of April 16, 1934; or any other authority granted to him to any tribe or tribal

organization which controls and manages any previously private school. The Secretary shall transmit annually to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives a report on the educational assistance program conducted pursuant to this section.

Pub.L. 93-638, Title II, § 208, Jan. 4, 1975, 88 Stat. 2216.

APPENDIX M

New Mexico Disclaimer of Jurisdiction over Indian Lands, Enabling Act, Sec. 2(B), 36 Stat. 558-559, N.M. Const., Art. XXI, sec. 2.

Sec. 2. Meeting of delegates; mandatory provisions of constitution.

The delegates to the convention thus elected shall meet in the hall of the house of representatives in the capital of the territory of New Mexico at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all. After organization they shall declare on behalf of the people of said proposed state that they adopt the constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the name and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent the United States and the people of said state:

B. that the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty;

and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress; but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe;

APPENDIX N

THE SNYDER ACT, 25 U.S.C. SEC. 13, NOV. 2, 1921, C. 115, 42 STAT. 208. EXPENDITURE OF APPROPRIATIONS BY BUREAU OF INDIAN AFFAIRS

The Bureau of Indian Affairs under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education. . . . .

APPENDIX O

INDIAN SELF-DETERMINATION ACT REGULATIONS, 25 C.F.R. PART 271 AND PART 274

RULES AND REGULATIONS
SUBPART A——GENERAL PROVISIONS
(EXCERPTS)

§ 271.1 Purpose and scope.

(a) The purpose of the regulations in this Part is to give the application and approval process for non-profit contracts with the Bureau under section 102 of Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, 88 Stat. 2203). Title I is known as the Indian Self-Determination Act. Contracts under the Act include "tribal governmental functions" as defined in § 271.2(q), "business related functions" as defined in § 271.2(d), and certain contractable trust resources programs or parts of programs as set forth in § 271.32. The nature of contracts with Indian entities which do not fall within the purview of the Act, including contracts which may provide for profit, and the conditions for entering into such contracts, are set forth in the regulations implementing the Act of June 25, 1910 (36 Stat. 861, 25 U.S.C. 47), commonly referred to as the "Buy Indian" Act.

(b) Section 104 of Title I of the Act provides authority for making grants for certain purposes. It is the Bureau's policy to make grants for the purposes specified in Section 104 of the Act in lieu of contracts, Part 272 of this chapter gives the procedures and requirements for obtaining grants under section 104 of the Act.

(c) Nothing in these regulations shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise im-

pairing the sovereign immunity from suit enjoyed by an Indian tribe;

(2) Authorizing or requiring the termination of any trust responsibility of the United States with respect to the Indian people; or

(3) Permitting significant reduction in services to Indian people as a result of this Part.

(d) Nothing in these regulations shall be construed to mandate a tribe to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of any Bureau program. Such applications under these regulations are strictly voluntary.

§ 271.2 Definitions

(i) "Indian" means a person who is a member of an Indian tribe.

(j) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students in any grade or grades from age 3 years through grade(s) 12; and, which at the time of application is controlled, and sanctioned or chartered by the governing body(s) of an Indian tribe(s).

(n) "Superintendent" means the official in charge of a Bureau of Indian Affairs agency office except that:

(2) The term means the Chief, Division of Facilities Engineering, for matters regarding contracting for all or part of the construction, building, and utilities program which is contractable under this part and which is within the responsibility of the Division of Facilities Engineering.

(p) "Tribal government, "tribal governing body" and "tribal council" means the recognized governing body of an Indian tribe.

(q) "Tribal governmental function" means all programs authorized to be administered by the Bureau for the benefit of Indians enumerated as line items in the Bureau's annual budget requests under the Activities of Education and Indian Services, the Subactivities of Direct Employment and Road Maintenance, and those programs related to Irrigation and Power Operation and Maintenance identified as a part of the subactivity minerals, mining, irrigation and power under the Activity of Tribal Resources Development.

(r) "Tribal organization" means the recognized governing body of any indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; *Provided,* That a request for a contract must be made by the tribe that will receive services under the contract; *Provided further,* That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract.

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the

maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

PART 274——SCHOOL CONSTRUCTION CONTRACTS OR SERVICES FOR TRIBALLY OPERATED PREVIOUSLY PRIVATE SCHOOLS

SUBPART A——GENERAL PROVISIONS

§ 274.1 Purpose

The purpose of the regulations in this Part is to give the application and approval process for obtaining a contract or services from the Bureau for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations under secions 204 and 208 of Title II of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638. 88 Stat. 2203).

§ 274.2 Scope.

The Act authorizes the expenditure of funds authorized and appropriated under Part B of the Act to contract or provide for tribally operated previously private schools. After an application has been completed and approved by the tribe, the application is forwarded through Bureau channels to the Commissioner for ranking by priority. If a project is within the funding priority, the Bureau contracting officer offers to negotiate a contract with the applicant subject to approval by the requesting tribe(s) for planning,

architectural-engineering design, facilities, construction, and purchase of equipment to provide educational facilities meeting Bureau space standards and construction code regulations. Subject to approval by the requesting tribe(s), the applicant then has the following options:

(a) Enter into a contract with the Bureau under which the applicant performs all or part of the necessary work with the Bureau performing the rest.

(b) Request that the Bureau perform or arrange for the performance of all the necessary work.

[40FR 51303, Nov. 4, 1975, as amended at 43 FR 37445, Aug. 23, 1978]

§ 274.3 Definitions

As used in this Part:

(a) "Act" means the Indian Self-Determination and Education Assistance Act (Pub. L.93-638.88 Stat. 2203).

(n) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau), that is operated primarily for Indian students from age 3 years through grade(s) 12; and, which at the time of application is controlled, sanctioned, or chartered by the governing body(s) of an Indian tribe(s).

APPENDIX P

25 CFR PART 31a, EXCERPTS, IMPLEMENTING PUBLIC LAW 95-561, TITLE XI 25 U.S.C. §§2001-2019.

PART 31a——INDIAN EDUCATION POLICIES

§ 31a.1 Purpose and scope.

The purpose of the Part is to state the policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs. Contract schools operated by Indian Tribes or Alaska Native entities may develop their independent policies, consistent with contractual obligations, or adhere to these. The adherence to the appropriate policies shall reflect the best interests of the student, the Federal government, the Tribes and Alaska Native entities, and shall be based on educationally sound judgment.

§ 31a.3 Mission statement

Recognizing the special rights of Indian Tribes and Alaska Native entities and the unique government-to-government relationship of Indian Tribes and Alaska Native villages with the Federal Government as affirmed by the United States Constitution, United States Supreme Court decisions, treaties, Federal statutes, and Executive Order, and as set out in the Congressional declaration in sections 2 and 3 of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638; 88 Stat. 2203; 25 U.S.C. 450 and 450a), it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians and Alaska Natives. As

acknowledged in section 5 of the Indian Child Welfare Act of 1978 (Pub. L. 95-608; 92 Stat. 3069; 25 U.S.C. 1901), in the Federal Government's protection and preservation of Indian Tribes and Alaska Native villages and their resources, there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska native children, including their education. The mission of the Bureau of Indian Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities. The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal or Alaska Native village contexts.

§ 31a.4 Policies

(n) *Priorities in contracts and grants.* Provide financial support through contracts, grants or other funding mechanisms with first priority given to the Tribes and Alaska Native entities, Tribal organizations, Tribally controlled community colleges, and Indian or Alaska Native professional or technical assistance organizations which have the sanction of the benefitting Tribes and Alaska Native entities.

(o) *Community school concept.* Promote the community school concept by encouraging year around multi-use of educational facilities, equipment and services for Tribal, Alaska Native village and community development.

(p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native

student's home as possible, except when a student elects to attend a school elsewhere for specialized curricular offerings or services.

APPENDIX Q

25 C.F.R. PART 252
INDIAN TRADER STATUTES, REGULATIONS FOR NAVAJO, HOPI AND ZUNI RESERVATIONS, (EXCERPT)

§ 252.1 Purpose.

The purpose of the regulations of this Part is to prescribe rules for the regulation of reservation businesses for the protection of Indian consumers on the Navajo, Hopi and Zuni Reservations as required by 25 U.S.C. 261, 262, 263, and 264.

§ 252.2 Scope

The regulations of this part apply to all persons who engage in retail business on the Navajo Reservation,. . .

(f) "Gross receipts" include the following:

(1) All cash received from the conduct and operation of the licensee's business at the premises described in the application for license.

(2) Receipts from both wholesale and retail transactions.

(3) Receipts resulting from transactions concluded off the reservation that originate from the conduct and operation of the licensee's business on the reservation.

(4) The market value of all property taken in trade on the date when received and either held by the licensee for purposes other than resale or credited on any account in payment for merchandise.

(5) Proceeds from the sale of any goods bought from Indians regardless of where the sale takes place.

(6) Finance charge received on loans, but not the return of principal.

§252.3 Definitions.

(i) "Peddler" means a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do business from a fixed location or site on any of those reservations.

(l) "Reservation business" means a person that engages at a fixed location or site within the exterior boundaries of the Navajo, Hopi or Zuni Reservations in the sale or purchase of goods or services or in consumer credit transactions with Indians and is not a bank, saving bank, trust company, savings or building and loan association or credit union operating under the laws of the United States or the laws of New Mexico, Arizona or Utah, a business on the Hopi Reservation that is wholly owned and operated by members of the Hopi Tribe, or a business on the Zuni Reservation that is wholly owned and operated by members of the Zuni Tribe.

§ 252.5 Reservation business license required.

(a) No person may own or lease a reservation business without a license issued under the provisions of this subpart.

§ 252.12 Peddlers permits.

(a) Except as provided in paragraph (b) of this section, no peddler may offer goods for sale within the exterior boundaries of the Hopi, Navajo, or Zuni reservations without a peddler's permit. The permit shall state on its face the class of goods that may be offered for sale. No peddler may offer for sale any class of goods other than those listed on the face of the permit.

Office - Supreme Court, U.S.
FILED
JAN 27 1982
ALEXANDER L. STEVAS,
CLERK

No.80-2162

October Term 1981

IN THE

Supreme Court of the United States

RAMAH NAVAJO SCHOOL
BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,

Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

JOINT APPENDIX

APPEAL DOCKETED JUNE 22, 1981
PROBABLE JURISDICTION NOTED
NOVEMBER 30, 1981

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Excerpts from Ramah Navajo School Appropriations Acts, Public Laws 93-120, 93-245, 93-404, 94-165, and 95-74 .....(J.S., p. 11 and 12)
Excerpts from 25 U.S.C. 2010, Public Law 95-561, Title XI, § 1130, November 1, 1978, 92 Stat. 2321 .....(J.S., p. 12)

Excerpts from Johnson O'Malley Act, 25 U.S.C. 452, April 16, 1934, c. 147, § 1, 48 Stat. 596; June 4, 1936, c. 490, 44 Stat. 1458 ..... (J.S., p. 12)
Excerpts from 25 U.S.C. 465, Act. of June 18, 1934, c. 576, § 5, 48 Stat. 985 ..... (J.S., p. 13)
25 U.S.C. §§ 261, 262 ..... (J.S., p. 13)
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Mandate of the Court of Appeals of the State of New Mexico, April 1, 1981 ..... (J.S., p. 42)
Decision with Findings of Fact and Conclusions of Law, District Court, First Judicial District Court of Santa Fe County, State of New Mexico ..... (J.S., App. F, p. 44)
Judgment dismissing claims on the merits, District Court, First Judicial District, County of Santa Fe, State of New Mexico ..... (J.S., App. G, p. 56)
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Excerpts from 25 C.F.R. Part 31a.....(J.S., App. P, p. 38)
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RELEVANT DOCKET ENTRIES

DISTRICT COURT, STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

No. CV-78-438

RAMAH NAVAJO SCHOOL BOARD, INC., AND LEMBKE CONSTRUCTION CO., INC.,
Plaintiffs,

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO
Defendants.

DATE	PROCEEDINGS
March 3, 1978	Complaint, Filed
April 11, 1978	Answer, Filed
July 6, 1978	Order
July 6, 1978	Amended Complaint, Filed
July 13, 1978	Defendant's Motion for Summary Judgment, Filed
July 19, 1978	Opposition to Motion for Sum mary Judgment, Filed
July 10, 1978	Stipulation (Filed in open Court) Document Stipulation (Filed in open Court)
August 17, 1978	Decision of the Court, Filed
September 6, 1978	Judgment, Filed
September 10, 1978	Notice of Appeal, Filed
April 3, 1981	Mandate, Filed (Affirmed)

April 19, 1981	Notice of Appeal, Filed
May 22, 1981	Amended Notice of Appeal and Proof of Service, Filed

RELEVANT DOCKET ENTRIES

COURT OF APPEALS OF NEW MEXICO

No. 4302

RAMAH NAVAJO SCHOOL BOARD, INC., AND LEMBKE CONSTRUCTION CO., INC.,
Plaintiffs-Appellants

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Defendant-Appellee.

DATE	PROCEEDINGS
July 1, 1980	OPINION (Affirm) W-H2-A
July 3, 1980	MOTION for Rehearing
July 11, 1980	ORDER deny Motion for Rehearing
July 29, 1980	Notice of Certiorari
August 15, 1980	Supreme Court grant Certiorari
August 15, 1980	WRIT OF CERTIORARI
March 31, 1981	CERTIORARI QUASHED on 3/30/81

April 1, 1981	MANDATE (Opinion to West)
May 11, 1981	Notice of Appeal to U.S. Supreme Court
May 22, 1981	Amended Notice of Appeal to U.S. Supreme Court
July 10, 1981	Stipulation that exhibits be transmitted with Record to U.S. Supreme Court
July 24, 1981	Certification to Supreme Court

RELEVANT DOCKET ENTRIES

SUPREME COURT OF NEW MEXICO

No. 13,230

RAMAH NAVAJO SCHOOL BOARD, INC., AND LEMBKE CONSTRUCTION CO., INC.,
Petitioners,

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondent.

DATE	PROCEEDINGS
July 24, 1980	Petition for Writ of Certiorari Notice to Court of Appeals
August 14, 1980	Order Granting Petition for Writ of Certiorari
December 23, 1980	Motion for Leave to File Amicus Brief and Participate in Oral Argument

February 5, 1981	Order Granting Motion to File Amicus Curiae Brief - 15 days to File
March 20, 1981	Amicus Curiae Brief - Navajo Tribe of Indians
March 30, 1981	Order Quashing Writ
May 11, 1981	Notice of Appeal to U.S. Supreme Court
May 14, 1981	Amended Certificate of Service

DISTRICT COURT, STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

RAMAH NAVAJO SCHOOL BOARD, INC.
AND
LEMBKE CONSTRUCTION CO., INC.,
Plantiffs

vs.

No. SF-78-438

BUREAU OF REVENUE,
STATE OF NEW MEXICO
Defendants

TABLE OF EXHIBITS ADMITTED
INTO EVIDENCE
Plaintiff's Exhibits Admitted

Exhibit No.		Page No. Tr. Proc. Marked	Offered	Rec'd	Page No. Ex. Vols.
P-1	Original Art. of Incorp. and Bylaws, Ramah Navajo School Board, Inc.				
	By Stipulation at 36-38				**003**
P-1(a)	Title 10, Navajo Tribal Code §51				
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P-2	Res. of Navajo Tribal Council, No. CAU-87-69 (8-8-69) enacting Navajo Tribal Community School Board Act				
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P-4 Res. of Navajo Tribal Council, No. _____ 07-73 (10-24-73) stating authority of Local Community School Boards including Ramah Navajo School Board
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P-6 Res. of Navajo Tribal Counsel No. CMA-11-76 (3-10-76) endorsing continued operation of certain contract school programs
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P-7 Res. of Navajo Tribal Council No. CJN-24-76 (6-2-76) authorizing contracting under P.L. 93-638
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P-8 Res. of Navajo Tribal Council CMY-38-77 (5-5-77) authorizing Council Committee on Federal Relations to approve P.L. 93-638 contract applications
36-38,78 81 83 410

P-9 Res. of Navajo Tribal Council Committee on Federal Relations No. FR-7-77 (6-6-77) recommending contract for BIA social services, employment assistance and housing programs by the Ramah Navajo Community
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P-10 Res. of Navajo Tribal Council Committee on Federal Relations No. FR-38-78 (7-14-78) approv ing Ramah Navajo School Board's (and other) P.L. 93-638 school contracts
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P-11 Res. of Navajo Tribal Council Committee on Federal Relations No. FR-79-79 (6-19-79), approving renewal of Ramah Navajo Soc. Services, employment assistance and housing contracts with BIA [cover letter not admitted, Tr. 83]
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P-12 Testimony of Chavez Coho and Bertha Lorenzo for Ramah Navajo School Board, Inc. before Senate and House Interior and Related Agencies, Subcommittee on Appropriations (April 11 & 13, 1972) [admitted for limited purpose, Tr. 67]
By Stipulation at 36-38 420

P-21 Act of August 10, 1972, Public Law 92-369, 86 Stat. 508 (Interior Appropriations)
By Stipulation at 36-38 033

P-21(a) Act of October 4, 1973, Public Law 93-120, 87 Stat. 431 (Interior Appropriations)
By Stipulation at 36-38 036

P-22 Act of January 3, 1974, Public Law 93-245, 87 Stat. 1073 (Supplemental Interior Appropriations)
By Stipulation at 36-38 039

P-23 Act of August 31, 1974, Public Law 93-404, 88 Stat. 810 (Interior Appropriations)
By Stipulation 041 at 36-38

P-24 Act of December 23, 1975, Public Law 94-165, 89 Stat. 985 (Interior Appropriations)
By Stipulation 043 at 36-38

P-25 Act of July 26, 1977, Public Law 95-74, 91 Stat. 293 (Interior Appropriations)
By Stipulation 045 at 36-38

P26 Senate Report No. 95-276, 95th Congress, lst Sess. (1977) (Interior Appropriations)
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P-27 H.R. Report No. 95-461, 95th Congress, lst Sess. (1977) (Interior Appropriations)
36-38,90 81 83 336, 478

P-28 Contract between School Board and BIA for design of Ramah school facilities (10-20-72)
By Stipulation 048 at 36-38

P-29 Contract between School Board and BIA for construction of Ramah school (4-3-74)
By Stipulation 084 at 36-38

P-30 Contract between School Board and BIA for additional construction and furnishings for Ramah school (11-20-74)
By Stipulation 094 at 36-38

P-31 Contract between School Board and BIA for phase II construction of Ramah school (8-13-76)
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P-32 Contract between School Board and BIA for phase III construction of Ramah school (1-1-77)
By Stipulation 119
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P-34 Phase I Ramah-Lembke Contract for construction of Ramah Navajo School (8-16-74)
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P-34(a) Change Order to phase I Ramah-Lembke contract for construction of Ramah Navajo school (8-16-74)
By Stipulation 169
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P-47 Annual Report of School Finance Division State of New Mexico (1977-1978)
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P-50 Handrawn map of Ramah Navajo Reservation Area
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D-A	Letter dated March 11, 1974, from Michael P. Gross to Robert A. Dudley	311	311	312	504, 505
D-C	Certificate Report on special school bus transportation survey made in the Ramah Navajo area and memorandum to State Board of Edcation from C. B. Lemon	186	186	186	*
D-F	Standard Subcontract Form between Lembke Construction Co. Inc. and John Turner Painting Inc.; non-taxable transaction certifcate and invoice	By Stipulation at 36-38			349-356
D-G	Standard Subcontract Form between Lembke Construction Co., Inc. and Levis Bros. Plumbing and Heating, Inc.; non-taxable transactions certificate; estimate; pay invoice	By Stipulation at 36-38			357-367
D-H	Standard Subcontract Form between Lembke Constuction Co. Inc., and Butler Sheet Metal Co. and invoice	By Stipulation at 36-38			368-373

*No page number assigned Exhibit D-C not included in bound volume when transmitted with the record.

D-I Standard Form of Material contract Lembke Inc. and Builder's Specialty Service, Inc., invoice
By Stipulation 373-374
at 36-38

D-J Standard Form of Material Contract between Lembke and W & W Steel Co.; non-taxable transaction certificate, invoice
By Stipulation 375-379
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D-K Standard Form of Material Contract between Lembke Don J. Cummings, Co.Inc.; non-taxable transaction certificate, invoice
By Stipulation 380-383
at 36-38

D-L Standard Form of Material Contract between Lembke Showcase and Fixture Co., Inc.; non-taxable transaction certificate, invoice
By Stipulation 384-386
at 36-38

D-M Invoice from Rio Grande Steel Co. to Lembke for structural steel used in the construction of the Ramah Navajo School Facility
By Stipulation 387-388
at 36-38

D-N Copies of checks evidencing payment from Lembke to its subcontractors and material suppliers for work and materials for construction of the Ramah Navajo School facility
By Stipulation 389-392
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D-3 Portion of the specifications for the Ramah Navajo School facility containing invitation for bids with the general conditions of the contract attached
By Stipulation 99-111
at 36-38

DISTRICT COURT, STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

No. 78-438(c)
(Title omitted in printing)

ANSWER

Defendant Bureau of Revenue for its answer to the complaint, states as follows:

ANSWER TO COUNT I

First Defense

This Court lacks subject matter jurisdiction over a claim for refund by Plaintiff Ramah Navajo School Board, Inc. ("The Board"), because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count I.

Third Defense

Lembke Construction Co., Inc. lacks standing to assert the claim set forth in Count I.

Fourth Defense

1. Defendant denies the allegations of paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. Defendant denies the allegations of paragraph 2 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

3. Defendant admits the allegations of paragraph 3, except that Defendant is without knowledge or information sufficient to form a belief as to the truth of, and therefore denies, the allegation that the facilities constructed by Lembke are on Navajo trust lands.

4. Defendant admits the allegations of paragraph 4.

5. Defendant denies the allegations of paragraph 5.

6. Defendant denies the allegations of paragraph 6 for

lack of knowledge or information sufficient to form a belief as to the truth thereof.

7. Defendant denies the allegations of paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8. Defendant denies the allegations of paragraph 8.

9. Defendant admits the allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Defendant admits the allegations of paragraph 11.

12. Defendant admits the allegations of paragraph 12, except that it denies that it owes either Plaintiff anything.

ANSWER TO COUNT 2

First Defense

This Court lacks subject matter jurisdiction over a claim for refund by the Board because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count 2.

Third Defense

Lembke Construction Co., Inc. lacks standing to assert the claim set forth in Count 2.

Fourth Defense

1. In response to the allegations of paragraph 13, Defendant incorporates all the defenses, denials and allegations of its response to Count I of the Complaint as though here fully rewritten at length.

2. Defendant denies the allegations of paragraph 14.

ANSWER TO COUNT 3

First Defense

This Court lacks subject matter jurisdiction over a claim

for refund by the Board because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count 3.

Third Defense

Lembke Construction Co., Inc. lacks standing to assert the claim set forth in Count 3.

Fourth Defense

1. In response to the allegations of paragraph 15, Defendant incorporates all the defenses, denials and allegations of its response to Count I of the Complaint as though here fully re-written at length.

2. Defendant denies the allegations of paragraph 16.

ANSWER TO COUNT 4

First Defense

This Court lacks subject matter jurisdiction over a claim for refund by the Board because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count 4.

Third Defense

1. In response to the allegations of paragraph 17, Defendant incorporates all the defenses, denials and allegations of its response to Count I of the Complaint as though here fully re-written at length.

2. Defendant denies the allegations of paragraph 18.

3. Defendant denies that Plaintiffs' paraphrase of §72-16A-14.9, N.M.S.A. 1953, as set forth in paragraph 19, is accurate. The text of that statute reads as follows:

"Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the United States or any agency or instrumentality thereof or the state

of New Mexico or any political subdivision thereof may be deducted from gross receipts. Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the governing body of any Indian tribe or Indian pueblo for use on Indian reservations or pueblo grants, may be deducted from gross receipts."

4. Defendant denies the allegations of paragraph 20.

ANSWER TO COUNT 5

First Defense

This Court lacks subject matter jurisdiction over a claim for refund by the Board because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count 5.

Third Defense

1. In response to the allegations of paragraph 21, Defendant incorporates all the defenses, denials and allegations set out in its response to Count I of the Complaint as though here fully rewritten at length.

2. Defendant denies the allegations of paragraph 22 for lack of knowledge or information

3. Defendant denies the allegations of paragraph 23.

4. Defendant denies the allegations of paragraph 24.

ANSWER TO COUNT 6

First Defense

This Court lacks subject matter jurisdiction over a claim for refund by the Board because the Board is not a taxpayer.

Second Defense

The Board lacks standing to assert the claim set forth in Count 6.

Third Defense

Count 6 fails to state a claim upon which relief can be granted.

Fourth Defense

1. In response to the allegations of paragraph 25, Defendant incorporates all the defenses, denials and allegations of its responses to Counts I through 5 as if here fully rewritten at length.

2. Defendant denies the allegations of paragraph 26.

WHEREFORE, Defendant prays that it may have judgment dismissing all counts of the complaint, awarding Defendant its costs herein expended, and granting such additional relief as the Court deems just and proper.

(Signature and certification
omitted in printing)

**IN THE DISTRICT COURT OF NEW MEXICO,
FIRST JUDICIAL DISTRICT**

No. 78-438(C)

(Title ommited in printing)

AMENDED COMPLAINT

COUNT I

Pursuant to §72-13-40(A)(2), N.M.S.A., 1953 Comp., Petitioners seek judgment from this Court for refund of

gross receipts taxes paid since 1974, under color of the Gross Receipts and Compensating Tax Act, §72-16A-1 through §72-16A-34, N.M.S.A., 1953 Comp., and allege and represent as follows:

1. Petitioner, Ramah Navajo School Board, Inc. (hereinafter School Board), is a non-profit New Mexico corporation controlled and operated by and for the benefit of Indians who are members of the Ramah Navajo Chapter, an arm of Navajo tribal government located on the Navajo Indian Reservation in Valencia and McKinley Counties, New Mexico.

2. The School Board is a tribal organization of the Navajo Nation as that term is used in 24 USC §450b, P.L. 93-638, The Indian Slef-Determination and Education Assistance Act. It operates programs and projects primarily in the field of education for the benefit of Navajo Indians within the borders of their reservation on land held in trust by the United States for the Navajo Nation.

3. Petitioner Lembke Construction Co., Inc. (hereinafter Lembke), is a New Mexico for-profit corporation engaged in the construction business. Since 1974, Lembke has been under contract to the School Board to construct a school complex and related facilities on Navajo trust lands in Valencia County, New Mexico.

4. Throughout its relationship with the School Board, Lembke has been paying and continues to pay New Mexico gross receipts taxes assessed and collected by Respondent who has imposed the tax on the receipts from this project under color of the New Mexico Gross Receipts and Compensating Act, §72-16A-1 through §72-16A-34, N.M.S.A., 1953 Comp. As of December 1, 1977, these tax payments have totalled $161,543.34, and said tax payments have continued since that date.

5. By agreement with the School Board and in accord

with common business practice in New Mexico, Lembke has passed on this tax to its customer, the School Board, which has thus sustained the entire financial and economic burden of the tax.

6. The School Board's construction project has been financed entirely by the federal government through Congressional appropriations earmarked for the Ramah Navajo School Board, Inc. under Public Laws 93-120, 93-245, 94-165, and 95-74. These funds are intended to improve educational opportunities for Indians and were appropriated in aid of the federal Indian self-determination policy embodied in 25 USC §450, et seq., P.L. 93-638.

7. In June, 1968, the State of New Mexico ceased operating a high school for the Ramah Navajo area. As a result, Ramah Navajo children were forced to attend distant federal boarding schools. When efforts, including a lawsuit, failed to reopen the closed public high school, Petitioner, Ramah Navajo School Board, Inc., was formed. It has been operating a school program for Ramah Navajo children ever since, using federal funds obtained through contracts with the Bureau of Indian Affairs. Its current building program (on which the gross receipts taxes have been paid) is essential to the continuation of this educational program.

8. Imposition of the Gross Receipts and Compensating Tax Act on the construction program conducted by the School Board has severely constricted that project and has deprived Navajo Indians of the Ramah Navajo Chapter the right to govern themselves effectively by providing adequate educational opportunities for their children. The tax constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States.

9. On December 12, 1977, Lembke filed a claim for re-

fund of gross receipts taxes paid Respondent on the Ramah Navajo school project. Lembke's claim was for $161,543, plus interest as provided by law.

10. By agreement with the School Board, any refund of taxes obtained by Lembke will be paid over to the School Board. In turn the School Board is required by its contracts with the federal government to apply any such refunds to its construction project.

11. On December 17, 1977, the School Board moved to intervene in Lembke's claim proceeding.

12. On February 7, 1978, Respondent denied Lembke's claims. A copy of this denial is attached to this petition. Because of this denial, Respondent owes to Petitioners the sum of $161,543 as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest.

WHEREFORE, Petitioners respectfully pray for judgment reversing the decision of the Respondent and awarding them $161,543, as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest, for costs of this action, and such further relief as to the Court seems just.

COUNT II

13. Petitioners incorporate the allegations of Count I by reference.

14. The imposition of the tax in question violates New Mexico's Constitutional disclaimer of jurisdiction over Indian lands. Const. Art. XXI, §2. Respondent therefore owes Petitioners, $161,543, as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest.

WHEREFORE, Petitioners respectfully pray for judgment reversing the decision of the Respondent and awarding them $161,543, as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest, for costs of this action, and such further relief as to the Court seems just.

COUNT III

15. Petitioners incorporate the allegations of Count I by reference.

16. The Supremacy Clause, U. S. Constitution Art. VI, §2, bars the imposition of this tax because its collection burdens or interferes with a clear federal policy and program for the education of Indian children. Respondent thus owes Petitioners $161,543, as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest.

WHEREFORE, Petitioners respectfully pray for judgment reversing the decision of the Respondent and awarding them $161,543, as of December 1, 1977, plus an additional amount for gross receipts taxes paid pursuant to the construction program subsequent to that date, and appropriate interest, for costs of this action, and such further relief as to the Court seems just.

COUNT IV

17. Petitioners incorporate the allegations of Count I by reference.

18. At all material times Lembke has acted and continues to act as the School Board's agent for the purchase of construction materials used in the construction project involved herein. In turn the School Board has acted as agent of the

United States or the Navajo Nation in carrying out this project.

19. Section 72-16A-14.9, N.M.S.A., 1953 Comp., grants a deduction for the sale of tangible personal property to an agency of the United States or any Indian tribe.

20. Petitioners are therefore entitled to refund of $80,000 representing that portion of gross receipts taxes on this project attributable to the cost of tangible personal property, i.e., construction materials, purchased by the School Board as agent of the United States or the Navajo Nation.

WHEREFORE, Petitioners respectfully pray for an Order reversing the decision of the Respondent and awarding them $80,000 plus interest, the costs of this action, and such further relief as to the Court seems just.

COUNT IV

17. Petitioners incorporate the allegations of Count I by reference.

18. At all material times Lembke has acted and continues to act as the School Board's agent for the purchase of construction material used in the construction project involved herein. In turn the School Board has acted as agent of the United States or the Navajo Nation in carrying out this project.

19. Section 72-16A-14.9, N.M.S.A., 1953 Comp., grants a deduction for the sale of tangible personal property to an agency of the United States or any Indian Tribe.

20. Petitioners are therefore entitled to refund of $80,000 representing that portion of gross receipts taxes on this project attributable to the cost of tangible personal property, i.e., construction materials, purchased by the School Board as agent of the United States or the Navajo Nation.

WHEREFORE, Petitioners respectfully pray for an Order reversing the decision of the Respondent and award-

ing them $80,000 plus interest, the costs of this action, and such further relief as to the Court seems just.

COUNT V

21. Petitioners incorporate the allegations of Count I by reference.

22. In addition to gross receipts taxes paid on actual construction work, the School Board has also paid its architects $24,000 since 1974, for gross receipts taxes which they, in turn, paid to Respondent under color of the Gross Receipts and Compensating Act, *supra,* as of December 1, 1977.

23. Imposition of said tax on architectural fees for this project also violates New Mexico's Constitutional disclaimer of jurisdiction, Art. XXI, §2, *supra;* interferes with federal Indian policy; and severely burdens Navajo tribal self-government, all in violation of the laws and Constitution of the United States.

24. The School Board is entitled to a refund of $24,000 plus interest for taxes paid by its architects and charged to the School Board.

WHEREFORE, Petitioner, Ramah Navajo School Board, Inc., prays for an Order reversing the decision of the Respondent and awarding its $24,000 plus interest, the costs of this action, and such further relief as to the Court seems just.

COUNT VI

25. Petitioners incorporate the allegations of Counts I through V by reference.

26. Petitioners are continuing to pay and have paid gross receipts taxes on the project in question during the pendency of this action and unless restrained, Respondent will continue to impose the New Mexico Gross Receipts and Compensating Tax Act, *supra,* on this project.

WHEREFORE, Petitioners further demand repayment

of all taxes which they may pay under color of the New Mexico Gross Receipts and Compensating Tax Act, *supra,* since November, 1977; pray for declaratory judgment under §22-6-4, et. seq., N.M.S.A., 1953 Comp., 1975 Supp., declaring that under the New Mexico Gross Receipts and Compensating Tax Act, Respondent lacks jurisdiction to enforce the Act, *supra,* upon the construction project which is the subject of this lawsuit; pray that the Court grant a permanent injunction enjoining Respondent from imposing any taxes under the New Mexico Gross Receipts and Compensating Tax Act, *supra,* upon proceeds received or payments made by either of the Petitioners in connection with the construction project which is the subject of this lawsuit; and, additionally, pray for such other relief, including costs, interest, and so on, as the Court deems proper. DATE: June 17, 1979

(Signatures omitted in printing)

Attachment to Amended Complaint

STATE OF NEW MEXICO
BUREAU OF REVENUE
Santa Fe, New Mexico

An Equal Opportunity Employer

February 7, 1978

Michael P. Gross, Esq.
Post Office Box 1447
40 Sena Plaza Santa Fe , New Mexico 87501

Lembke Construction Co., Inc.
Claim for Refund

Dear Mr. Gross:

As you of course know, we have received Lembke Construction Company's claim for refund and the informal discussion paper which you submitted at the time of the informal conference on January 6, 1978. We have also reviewed copies of Lembke's construction contracts submitted subsequent to the informal conference.

After consideration of the facts and arguments you have presented, Lembke Construction Co's claim for refund is denied. The gross receipts of a non-Indian contractor, such as Lembke, from performing construction services on a reservation in New Mexico are taxable. *Mescalero Apache Tribe v. O'Cheskey,* Case No. 76-171B D.N.M. Memorandum Opinion October 19, 1977, on appeal Tenth Circuit Court of Appeals No. 77-2103. See also *Prince v. Board of Education,* 88 N.M. 548, 543 P.2d 1176 (1976). If Lembke

Construction Co. Should decide to pursue its administrative remeday pursuant to §72-13-38, N.M.S.A. 1953, Ramah Navajo School Board, Inc.'s motion to intervene will then be considered. There is no need to rule on that motion at this time.

IN THE DISTRICT COURT OF NEW MEXICO,
FIRST JUDICIAL DISTRICT
No. 78-438(C)

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

RAMAH NAVAJO SCHOOL BOARD, INC., et al.,
Plaintiffs,

-vs- No. SF 78-438

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant.

ORDER

This matter having come on before this court upon the motion of the Plaintiffs to amend their Complaint to provide for additional gross receipt tax payments between the time the original computation was made and the present; this Court having considered the motion and being appraised in the premises,

IT IS, THEREFORE, ORDERED:

1. That the Plaintiffs be, and hereby are, permitted to file an Amended Complaint, a copy of which is attached hereto and incorporated herein as Exhibit "A", but that such must be filed within five days from the entry of this Order.

2. That the Defendant's Answer to the original Complaint be, and hereby is, applied to and considered as the Answer to the Amended Complaint.

/s/
DISTRICT JUDGE

(ATTORNEYS' SIGNATURES OMITTED IN PRINTING)

IN THE DISTRICT COURT OF NEW MEXICO,
FIRST JUDICIAL DISTRICT

No. 78-438 (C)

Stipulation of Facts

(Title ommited in printing)

STIPULATION

Plaintiffs Ramah Navajo School Board, Inc., hereinafter referred to as School Board and Lembke Construction Company, hereinafter referred to as Lembke; and Defendant State of New Mexico, Bureau of Revenue, hereinafter referred to as Bureau of Revenue, by their respective attorneys hereby stipulate as follows:

1. Ramah Navajo School Board, Inc., is a non-profit corporation incorporated under the New Mexico Non-profit

Corporation Act, §53-8-1, et seq. NMSA 1978. All members of the corporation are members of the Ramah Navajo Chapter. Ramah Navajo Chapter is a local unit of Navajo Tribal Government located on the Ramah Navajo Indian Reservation in Valencia and McKinley Counties, New Mexico.

2. The School Board's affairs are managed by a Board of Trustees. The members of the Board are elected by the Ramah Navajo Chapter. Only members of the Ramah Navajo Chapter are eligible to be members of the Corporation or members of the Board of Directors. The School Board operates programs and projects primarily in the field of education for the benefit of Ramah Navajo Indians located on the Ramah Navajo Reservation. The Reservation is one of three satellite reservations in New Mexico to the Navajo Indian Reservation proper. It is located approximately thirty-five miles southeast of Gallup, New Mexico, and it is the home of a group of Navajos whose ancestors settled the region many years prior the Long Walk of 1868.

3. The School Board is a Navajo "tribal organization" within the meaning of 25 U.S.C. §450b(c), for purposes of entering into contracts with or receiving grants from the Bureau of Indian Affairs.

4. In 1973, the Bureau of Indian Affairs contracted with the School Board for the design of new school facilities, and, in 1974, contracted with the School Board for actual construction of school facilities, pursuant to specific congressional appropriations solicited by and made to the Ramah Navajo School Board.

5. All the money with which the Ramah Navajo School facilities were constructed and continue to be constructed with came from the federal government through specific congressional appropriations to the School Board under P.L. 92-369, P.L. 93-120, P.L. 93-245, P.L. 93-404, P.L.

94-165, and P.L. 95-74. In order to obtain these appropriations, members of the School Board testified before Congress on many occasions to justify their need for these monies. Navajo Tribal monies were not used to construct the new school facilities.

6. The Navajo Tribe, acting through its tribal council, has authorized and continues to authorize the School Board to contract with the Bureau of Indian Affairs, pursuant to P.L. 93-638 for monies to operate the Ramah Navajo School facilities.

7. The new educational facilities are located exclusively on Navajo trust land leased to the School Board for educational uses and purposes. The contracts between the Bureau of Indian Affairs and the School Board designate the Ramah Navajo School Board as the design and building contractor. The initial contract for construction vests title to the educational facilities in the School Board.

8. Since 1974, Lembke, a non-Indian entity, has been under subcontract with the School Board to construct a school complex and related facilities in fulfillment of the School Board's obligations to the United States under its contracts with the Bureau of Indian Affairs.

9. The construction contracts between Lembke and the School Board require that Lembke pay New Mexico taxes required by law. Section 4.6.1 of the general conditions of the contract.

10. Throughout its relationship with the School Board, Lembke has been paying and continues to pay New Mexico gross receipts tax to the Bureau of Revenue on its receipts from the school construction project. Lembke's bids or cost estimates have always included the tax as a part of the cost to the School Board.

11. There were two bidders for construction of this pro

ject, both of which included New Mexico gross receipts tax in their bids.

12. Section 1Y of the general requirements attached to the invitation for bids for the Ramah Navajo School construction project informs bidders that they must compl with New Mexico "sales and use tax laws."

3. The School Board has no direct liability to the Bureau of Revenue for gross receipts taxes arising from the construction of the Ramah School facilities. However, pursuant to its agreement with Lembke, Lembke has passed on this tax to the School Board, which has thus sustained the financial burden of the tax.

14. Defendant's exhibits F through N, attached to the affidavit of Jan Unna filed in support of Defendant's Motion for Summary Judgment, represent typical subcontracts, materials contracts, invoices, non-taxable transaction certificates, and payments to materials suppliers and subcontractors of Lembke Construction Company for the Ramah School construction project. These documents represent the typical manner in which materials were purchased, invoiced and paid for by Lembke on the Ramah School construction project. The procedures reflected in these documents for the Ramah School project represent the standard practice of Lembke in handling these matters in other construction projects which occur off of any Indian reservation.

15. To date, Lembke Construction Company has paid the Bureau of Revenue the total sum of $232,264.38 on its gross receipts derived from the construction of educational facilities for the School Board, all of which payments have been reimbursed by the School Board from the federal funds allocated to this project under the congressional appropriations mentioned in Stipulation No. 5.

16. Lembke has agreed to repay the School Board any rebate or recovery it realizes as a result of this action.

17. In the contracts between Lembke and the School Board, Lembke was not expressly designated an "agent" for any purposes.

18. Plaintiff Lembke Construction Company has exhausted its administrative remedies. Architects/Engineers West and Hirschen, Gammill, Trumbo and Cook are not parties to the suit and have not exhausted their administrative remedies.

19. Education is one of several functions of Navajo Tribal government. Other typical functions of Navajo tribal government include such areas as: law enforcement and police power; road construction, repair and maintenance; economic development; housing; resources management; health care; and social welfare.

20. Approximately 450 Ramah Navajos attend the Pine Hill Schools, operated by the School Board for students in grades Kindergarten through 12. Approximately 35 Ramah Navajos attend Zuni High School at Zuni, New Mexico. Zuni High School is part of the New Mexico public school system operated by the Gallup-McKinley County school system. The State of New Mexico Education Department provides bus service solely within McKinley County for those students from Ramah Village to Zuni High School and back.

(Signatures of Attorneys omitted in printing)

(Signature omitted in printing)

DISTRICT COURT, STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

No. CV-78-438

RAMA NAVAJO SCHOOL BOARD, INC., AND LEMBKE CONSTRUCTION CO., INC.,
Plaintiffs.

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO
Defendants.

Excerpts From Testimony on July 20, and 23, 1979 at Santa Fe, New Mexico

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[Tr. 42]

LARRY MANUELITO

was called as a witness and after first having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. GROSS:

Q. Would you please state your name.

A. Yes. My name is Larry Manuelito and I am a Navajo.

Q. What is your occupation, please?

A. I am in private business right now in the construction.

Q. Are you a building contractor?

[Tr. 43]

A. Yes. I am.

* * * *

[Tr. 45]

* * * *

Q. Step back a minute. You said you were in the construction business. How did you get into the construction business as a practical matter?

A. I became interested in the construction business through my involvement with the Ramah Navajo School Board. I was an employee with the Ramah Navajo School Board for a number of years and then served as an executive director and in that capacity had responsibility, since the School Board was given the responsibility to manage the construction job. Ramah had very close contacts with the contractor on the job and was involved in the initial negotiations of those contracts.

* * * *

[Tr. 47]

* * * *

Q. Are you familiar with general business practice in the construction industry regarding this tax?

A. Yes.

Q. Can you tell us whether or not — How contractors generally in this state handle the gross receipts tax?

A. Well, they pass that cost on to the clients.

* * * *

Q. Can you state whether you know of any circumstances involving construction in New Mexico where a contractor did not pass on this tax to his owner or his contracting partner on the other end?

A. Not at this point, no.

Q. You don't know of any cases?

A. No.

[Tr. 48]

Q. So as far as you know, it is a general practice?

A. Yes. It is a general practice because — I am new in the business and that is what is my understanding that that is the general practice.

Q. Do you include the taxes [sic, i.e. tax as] part of your bid in the work that you bid in?

A. Yes.

* * * *

Q. As a preliminary matter, Larry, will you please tell the Court where the construction site that we are talking about is located.

A. Yes. It is located on the Valencia County site of the Ramah Navajo Reservation; approximately sixteen miles south of Highway 53. About seven miles south,

[Tr. 49]

more south than west of Grants, New Mexico.

* * * *

[Tr. 57]

BY MR: GROSS

Q. The School Board went to Washington to solicit funds for the construction, correct?

A. Yes.

Q. Were you familar with the form in which Congress acted? In other words, what mechanism did they pass a law?

A. Yes. After committing [sic, i.e. comittee] hearings, then they decided whether the request is warranted, then they passed a law and it is included in federal law as to how much money is appropriated for the request and Ramah's case was 2.7 million dollars. The only change of that legislation was an

amendment to the original bill that appropriated those funds and that was language that provided direct funding from Congress to the Ramah Navajo School Board, by-passing the Bureau of Indian Affairs.

[Tr. 58]

Q. Those facilities are all on Navajo trust land?

A. Yes.

Q. How does that work? The School Board leases the land from the tribe?

A. Yes. The School Tribe [sic, i.e., Board] received a lease from the Navajo Tribe for — I don't know. For those purposes.

* * * *

[Tr.60]

Q. I hand you documents which have already been stipulated fully and admitted into evidence in this matter. P-21(A) and P-22. Will you look at those.

A. Yes. This public law 93-120 was the original law that was passed that included the appropriations for Ramah Navajo School Board.

Q. What is the other document?

A. The other document is an amendment that included the special language that made it possible for Congress to directly fund the Ramah Navajo School Board.

Q. Did you have any help from any members of the Congressional Delegation in obtaining that special language?

A. Yes. The late Senator Montoya was very influential in the appropriations; also the change of language. In fact, he was the one that introduced or requested the change of language so the School Board could receive funds directly.

Q. In what manner did Senator Montoya help you? In other words, what did he do?

A. He worked very hard in the committee that he was involved with in introducing and supporting the Ramah School Board's request for these educational funds. Many times, over the objections of the

[Tr. 61]

Bureau of Indian Affairs.

* * * *

[Tr. 62]

Q. What is the document?

A. It was a request made by Senator Montoya on behalf of the Ramah Navajo School Board to allow a change of language. To amend the change of language in the original appropriation because there was fear that the Bureau of Indian Affairs, if they got the money, would establish their own priority and it was a very strong possibility, based on practices in the past that the BIA would use these funds elsewhere. It was for that reason that the Ramah Navajo School Board requested Senator Montoya to allow funds to go directly to the Ramah Navajo School Board so the Bureau of Indian Affairs could not use it elsewhere. This is a letter that was requested of Senator [sic, i.e. Bible] Balboa who was then in the subcommittee for the appropriations of this senate.

* * * *

Q. Can you characterize generally speaking what the Ramah Navajo School Board's position was at the time you were director, and now, if you know, concerning the relationship it has or had with the Navajo Tribe and the BIA?

A. The Ramah Navajo School Board has alway held excellent relationship with the Navajo Tribe and as far as I know, they still do. The relationship that the Ramah Navajo School Board had with the Bureau of Indian Affairs the early years is not good because the Bureau of Indian Affairs objected to the operation of the school and was, again, because of these objections, that the School Board had to go directly to Congress to bypass the Bureau of Indian Affairs

* * * *

[Tr. 72]

* * * *

Q. Has Ramah Navajo Chapter at any time attempted to disassociate itself from the Navajo Tribe?

A. No. Ramah Navajo Chapter is a sub — Our community government of the Navajo Tribe for that particular community, and they have the representative in the Navajo Tribal Council.

Q. What is the relationship between the chapter and the Ramah Navajo School Board Incorporated?

A. The chapter authorized and set up the Ramah Navajo School Board, then the Ramah Navajo School Board is an agent of the chapter.

Q. What was the purpose for setting up the Ramah Navajo School Board by the chapter?

A. At that time it was felt that because of the federal law that was in existence, that there was a requirement that there had to be an incorporated body and the initial problems and needs in that community happened to be education so they formed a school board.

* * * *

[Tr. 76]

* * * *

BY MR. GROSS:

Q. You said you were familiar, I believe, with prior dealings with the Navajo Tribe as Director of Ramah with the Navajo tribal government, is that true?

A. Yes, I am.

Q. Does the Navajo Tribe have any particular interest in any particular field of governmental functions?

A. Yes, they have major interests and one of them is education. They have a division of education with responsibility to set up equivalent to a State Department of Education, Division of Education of the Navajo Reservation.

* * * *

[Tr. 83]

* * * *

BY MR. GROSS:

Q. What was the relationship between the Ramah Navajo School Board and the BIA during the

[Tr. 84]

construction phases of this school regarding payments of money by the Bureau to Ramah?

A. Once the initial hurdle of convincing the Congress that the need was there for an educational facility, the BIA was required to work with the Ramah School Board to assist them in any way possible to help them in the various programs except for the first appropriation. The Ramah Navajo School Board administered those funds; set up a trust account and informed the Bureau of Indian Affairs of its payments and copies of those payments were sent to the BIA.

Q. Did the Bureau of Indian Affairs exercise any approval authority of any kind with regard to subcontractors?

A. No, they did not.

Q. Did you at any time inform the Bureau of your relationship with Lembke Construction Company?

A. Yes, we did. We requested bids for the first phase of that construction. There were two bidders and they were both way over the amount of money that was available and we selected the lowest one and negotiated a contract award with them and upon the award of the contract, we informed the Bureau of Indian Affairs that Lembke was our

[Tr. 85]

contractor.

Q. Did the Bureau at any time inform you of any objections it had to your contracting with Lembke Construction Company?

A. They did not, nor did they do it in regards to the architect's contract.

* * * *

[Tr. 87]

* * * *

Q. Do you recall the Phase III construction appropriation for Ramah?

A. Yes.

Q. Approximately what year did that occur?

A. I believe it was 1977.

Q. Is this the last of the construction phases at Ramah that you are aware of?

A. Since I have left, I don't know whether there has

[Tr. 88]

been any more since then, but there wasn't any more when I left.

Q. Were there any special circumstances involved in that appropriation in respect to Congress' attitude towards Indian construction?

A. Yes. There was a big uproar in Congress about misapplication of construction plans and the shoddy construction that was happening out on the Indian reservations, using federal funds and people that were attacked at that time was the Bureau of Indian Affairs who had the responsibility for all school construction across the United States for Indian Schools. Because of that, we had to go back and convince Congress that this particular project at Ramah was different and that it was approved by Congress and that we administered that construction ourselves and that it was not like the Bureau of Indian Affairs construction. In fact, Congressman Mertha [sic, i.e. Murtha] from Pennsylvania, on our invitation, came out to Ramah and visited the community and also visited other institutions that were constructed by the BIA and it was his report to the committee that made it possible for Ramah Navajo School Board to receive another appropriation to continue the construction program at Ramah for

[Tr. 89]

specifically the library.

Q. Are you aware whether any other school got money that year to build, or any other funding for school construction?

A. There was only one other school and the reason I know of it is because they testified for the committee right after us.

Q. I will hand you Document P-26 and ask you to identify it.

A. This is an appropriation bill.
Q. Is it a bill?
A. The Department of Interior, related agency appropriation Bill 1978. It is a report on that bill.
Q. Is Ramah mentioned in that report?
A. Under 19, Ramah High School constructional [sic, i.e., instructional] media center is mentioned in the amount of two million sixty-two thousand dollars.
Q. What is the relationship between this report and the facts you have just told us about concerning Congress' actions with regard to Ramah that year?
A. This was done — Ramah was one of two schools that was allowed and there was no other government schools that were allowed funding that year and the only reason why we were allowed is because we had

[Tr. 90]

convinced the Congress and the Committee that Ramah School, the project was handled properly and that it was operated by the Ramah Navajo School Board and not by the Bureau of Indian Affairs.

* * * *

[Tr. 94]

* * * *

CROSS-EXAMINATION

BY MR. RICHARDSON:

* * * *

[Tr. 95]

* * * *

Q. You also testified that you are on the Indian Affairs Commission, is that right?
A. Yes.
Q. This Indian Affairs Commission serves the Indian

population in the State of New Mexico, is that correct?

A. Yes, it does.

Q. It performs services of some sort for them?

A. It assists the various Indian groups in their efforts to deal with State government.

A. [sic, i.e. Q] Does the Indian Affairs Commission have a budget or appropriation from State monies?

A. Yes, they do.

Q. And do you get any per diem for the time or your travel to and from Indian Affairs Commission?

A. I am just like any commission members. I am

[Tr. 96]

reimbursed for mileage from whereever [sic] I go. Usually, it is no more than a day.

Q. So I assume that this reimbursement you get is out of the budget of the Indian Affairs Commission?

A. I assume that is where it is coming from.

Q. So in effect, you do serve — This Indian Affairs Commission is providing some services to the Indian from the State, isn't it?

A. Not in terms of direct services, no. Just in terms of because the State doesn't understand the problems of the Indian people or how to go about dealing with various Indian communities. In that sense, we serve as a buffer or we advise on certain things.

Q. You don't think that is of any benefit to Indians?

A. It is of benefit to the Indians primarily because if Indian people didn't call for representation in some way within the State, there would be no benefit, I would think. In fact —

Q. It is of some benefit to Indians, isn't it?

A. I imagine so, yes.

Q. You seem to be somewhat familiar with Indian education in this State, is that correct?

A. Yes, I am.

Q. Isn't it true that the State has a duty to educate

[Tr. 97]

all citizens within its borders; Indian, non-Indian alike? Right of free public education for them?

A. Yes. That's true.

* * * *

[Tr. 103]

* * * *

Q. Going back to the gross receipts tax, when you first negotiated the contracts with Lembke, the School Board understood that that gross receipt tax was going to be the cost of having the project

[Tr. 104]

built, didn't they?

A. Yes.

Q. They understood that from the outset?

A. Yes.

Q. All the money that has been used to construct the Ramah school facilities, that was all money appropriated to the School Board, by federal congressional appropriations, is that right?

A. Yes.

Q. No tribal funds have gone into constructing that school, isn't that right?

A. Right.

Q. It is also operated under grant money that comes through the Bureau of Indian Affairs, isn't that true?

A. Yes.

Q. The Ramah Navajo School Board is a nonprofit corporation?

A. Yes.

Q. It is incorporated under the laws of the State of New Mexico, isn't that correct?

A. Yes, it is.

Q. It was authorized by the Ramah Chapter of the Navajo Tribe, isn't that right? The creation of the School Board?

[Tr. 105]

A. Yes, it was.

Q. Was there a consultation with the Navajo Tribe and the tribal council before the school board was created?

A. Yes, there was.

Q. You testified that the Navajo Tribe had an interest in education of their people, isn't that right?

A. Yes.

Q. They have an interest in lots of areas, don't they? Like providing good health care for their people, providing roads?

A. Yes.

Q. Providing police protection?

A. Yes.

Q. So they have got a lot of different interests in the welfare of the people?

A. Yes.

Q. They try to protect the natural resources in the tribe?

A. Yes.

Q. They try to raise money for programs for the tribe?

A. Yes.

Q. So education is just one of those tribal concerns?

A. Yes. Education is the biggest concern.

Q. You think it is the largest concern of the tribe?

[Tr. 106]

A. Yes, it is, because before you can have anything else, you have to have your people educated.

* * * *

[Tr. 108]

* * * *

A. During the negotiations which I was involved in with the Ramah Navajo School Board in the absence of Public Law 93-638, the Congress inserted special language to allow the money to go directly from Congress to the School Board and in effect allow the School Board to take the place of the Bureau of Indian Affairs facilities in engineering what prior to this particular project was handled by the

[Tr. 109]

facilities engineering people, the BIA themselves. What 93-638 did was to transfer former responsibilities to Indians for Indians to run so they can have the direct relationship with the United States government. So what we in effect did in not just this contract, but all of the other contracts, is we took the place of the Ramah Navajo agents [sic, i.e., agency]. In fact, we contracted the majority of the programs there. That is how I base my —

Q. Is there any language in those contracts —

* * * *

A. I can quickly look through it, but I don't know whether there is anywhere in there where it says that is an agent. In our discussions and negotiations with the government, this is the first time that a contract of this sort was being done with any Indian

group. We took the place of the BIA's facility engineering people.

Q. Does the School Board get anything like textbooks or anything like that from the State of New Mexico?

A. During the time I was there we didn't. I don't know whether they do now or not.

[Tr. 113]

* * * *

Q. You agreed earlier that the State had an obligation to provide a free education for all the citizens in this State, both Indian and non-Indian. Are you aware, there are Indian students that go to State institutions, aren't there?

A. Yes.

Q. There are Indian students in higher educational institutions that are public in New Mexico? For instance, like the University of New Mexico.

[Tr. 114]

A. Yes.

Q. In fact, the Indians get other types of benefits too, don't they? Like, isn't State Road 53 maintained by the State?

A. Yes, it is.

Q. You drive over State Road 53 every time you go to Ramah, don't you?

A. Yes.

Q. And other Ramah Navajos on there, I assume, drive over State Road 53 also?

A. Yes.

Q. There are other indirect benefits that Indians have from the State of New Mexico such as the fact that you are allowed to sue in State court for this action, isn't that right?

A. Yes.
Q. There is law enforcement protection provided?
A. Not on our reservation.
Q. Your Navajo State Police are trained in the State Police Academy, aren't they?
A. They also pay for their training.
Q. But they are also trained at that academy, aren't they?
A. I assume.

* * * *

[Tr. 115]

REDIRECT EXAMINATION

MR. GROSS:

* * * *

Q. Larry, does the State of New Mexico public school system operate the school buses or provide any form of local schooling for the majority of Ramah Navajo children at Ramah?
A. There are no State school buses for educational facilities on the Ramah Navajo Reservation.

* * * *

[Tr. 116]

* * * *

Q. Why did the Ramah Navajo School Board choose to incorporate?

[Tr. 117]

A. Because there was no Public Law 93-638 and there was a requirement by the United States government that in order for an organization like this to conduct business directly with the government, that you had to be incorporated and it was only for that reason that the School Board became incorporated.
Q. Have you any idea as to how many Ramah Navajos,

and if so, how many went to college before the creation of the Ramah Navajo School Board?

A. Yes. I am aware of only, I think, one or two, out of that community of two or approximately four years that has a college degree.

Q. Approximately how many have matriculated into college since the creation of the Ramah Navajo School Board?

A. I would say fifty or sixty.

Q. Did the Ramah Navajo School Board construction program - was it necessary to cut back the Ramah Navajo school construction program in any way because of this tax?

A. It cost us 4 1/4% and whatever that 4 1/4% would buy, that would be how much the School Board would be losing.

* * * *

[Tr. 118]

* * * *

Q. Are you aware whether there is a separately contained cafeteria at the Ramah Navajo School site at Pine Hill?

A. There isn't, no.

A. Are there enough classrooms to conduct the programs of the School Board?

A. No, because when I was there, we had a number of portable classrooms. In fact, high school facilities which was meant for classrooms partially is being used as a cafeteria.

Q. Is there any permanent structure that serves as an administration building?

A. No, there is only a portable building.

Q. Has the construction on the site been completed?

A. No, it has not.

[Tr. 119]

Q. Could any one or more of these items have been built at the time or now if this tax money had not had to be paid to the State of New Mexico?

A. I think at the time it could have built a lot because of — Right now, I'm not sure how much that amount of money would buy.

* * * *

Q. So agency, BIA Agency at Ramah, which you referred

[Tr. 120[

to, that means the local BIA Office?

A. Yes.

Q. Just to nail it down, you are saying that the Ramah Navajo School Board his in effect taken over the functions of that agency?

A. It has taken over 90% of the functions of the agency.

* * * *

[Tr. 121]

* * * *

RECROSS EXAMINATION

BY MR. RICHARDSON:

* * * *

Q. Before you actually got the construction money to start building your school, Ramah Navajo School Board operated the school and some facilities that were in the town of Ramah, is that correct?

A. Yes.

Q. Although these facilities weren't what you wanted and weren't large enough for what you wanted to do, you were still operating your own school, is that correct?

A. We operate our own school in that facility which

[Tr. 122]

we had to pay to renovate because it was condemned.

Q. But that was from federal money you got from Congress, wasn't it?

A. Yes. No, those monies were not from Congress. Those monies to renovate those old buildings came from the Tribe.

Q. Then construction started in what? Approximately 1974?

A. Somewhere around there. I am not --

Q. When was the first year you held school in your new facilities?

A. '75, I believe.

Q. And you have been holding school in those facilities ever since then, haven't you?

A. Yes.

Q. You have been running your own program to educate those people in your own school facilities since '75, haven't you?

A. Yes.

Q. The fact that you had less money because of the gross receipts tax did not prevent you from providing some level of education, did it?

A. No. We had to use our imagination.

Q. But you did provide some level of education, didn't you?

[Tr. 123]

A. Yes.

Q. When the first bids came in on the first phase of construction, there was a lot less - or the bid came in a lot higher than you had expected, isn't that correct?

A. Yes.

Q. So additions [sic, i.e., decisions] had to be made as

to where you were going to cut back - as to what was going to be built, isn't that right?

A. Yes.

Q. Then eventually, because you couldn't build everything you planned to in the first phase, you went to Congress and you got more money and you built your gymnasium with that extra money, isn't that right?

A. Yes.

Q. So the fact that the amount of buildings you could build with your first money for Congress was substantially lower than what you planned, was largely the fault of the fact that the architect had over estimated what could be built with the amount of money you were going to get, isn't that right?

A. I guess you could say that. Consistent with all other projects in the reservation.

[Tr. 124]

Q. Also inflation was a factor in not being able to build as much as you wanted to? Didn't things cost more than when you originally planned them?

A. I imagine they did, yes.

Q. So there were other factors other than the gross receipts tax that affected what you built, weren't there? In fact, the amount of money that would have been involved in this first phase contracts in terms of the 4 1/2% or 4 1/4% gross receipts tax wasn't two hundred thousand, but it was less than that, wasn't it?

A. I don't recall how much it was.

Q. Assuming that the amount of gross receipts taxes that have been paid by Lembke at this point in time are two hundred thirty two thousand after the

Phase I contract, that wouldn't have been nearly that much, would it?

A. I have no idea.

Q. Do you know how much the Phase I contract was, don't you?

A. Yes.

Q. 2.7 million and 4% of that is less than two hundred thousand dollars, isn't it?

A. 4% of 2.7 million? I guess that would be.

Q. Because of the fact that you didn't have the money,

[Tr. 125]

couldn't build as many buildings as you wanted to, meant you had to cut back on what buildings you were going to build and there was not a particular building that you can say we couldn't build simply because of the tax, is there?

A. Yes. What was projected, not because of the tax, no.

Q. It was because of all these factors, right?

A. Right.

Q. In fact, there is a cafeteria that is operating right now at Ramah School, isn't there?

A. Yes. A makeshift one.

Q. It is in an enclosed building, isn't it?

A. Yes.

Q. It is operating, isn't it?

A. Yes.

Q. Hot meals are being served from it?

A. Yes.

Q. Kids are getting hot meals from it?

A. Yes.

Q. The fact that it is not in a separate building doesn't make it a cafeteria, does it?

A. No. It takes twice as long to serve.

Q. But there is a cafeteria there, isn't there?

A. Yes.

[Tr. 126]

Q. There is an administration building, is there not?

A. Yes. Portable.

Q. But it still serves the function of an administration building? Adminstration activities are functioned there, aren't they?

A. Yes.

Q. The buildings there aren't permanent ones, but they still serve as a classroom, aren't they?

A. Yes.

Q. They still derive the same function as a building that is permanently affixed to the ground, can't it?

A. Yes.

Q. I have no further questions.

* * * *

[Tr. 128]

* * * *

NEIL ULLERY

was called as a witness and after first having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. VAN AMBERG:

* * * *

Q. Mr. Ullery, what is your occupation?

A. I am Secretary-Treasurer and Controller of Lembke Construction Company, Incorporated.

Q. Is Lembke Construction Company, Incorporated one of the Plaintiffs in this matter?

A. Yes, sir.

THE COURT: Mr. Ullery, in respect to Lembke Construction Company, is that a New Mexico

[Tr. 129]

corporation?

A. Yes, sir.

THE COURT: Does it have its principal place of business in New Mexico?

A. Albuquerque, yes, sir.

Q. Mr. Ullery, what is Lembke Construction Company's primary business or function?

A. Commercial buildings, general contractor.

* * * *

Q. Mr. Ullery, Lembke Construction Company built the Ramah School facility to the extent it exists which is the subject of this litigation?

A. Yes, sir.

Q. Sort of recapping the stipulations, Lembke Construction Company, in preparation of its bid, included gross receipts tax in that bid?

A. Yes, sir.

[Tr. 130]

Q. Then it passed these gross receipts tax on to Ramah for payment?

A. Yes, sir.

Q. Is this the passing of gross receipts tax unto [sic] a client from a general contractor a usual custom in the business, in the contracting business within the state, to your knowledge?

A. Yes, sir.

Q. Why is it that gross receipts taxes are traditionally passed on to the client in the contracting business?

A. If we didn't, we couldn't sustain our operation because year in and year out, our margin of profit is less than gross receipts tax. Secondly, or probably first, the specifications for the job require that the

contractor include in his bid all exiting [sic] applicable taxes of any nature whatso ever.

* * * *

[Tr. 133]

* * * *

Q. Would you have contracted with Ramah to build the school on basically the same terms and conditions that you have contracted for in the past if Ramah

[Tr. 134]

had refused to indemnify you for tax, for gross receipts tax?

A. Well, sir, it is our interpretation that we are responsible for paying gross receipts tax on our receipts. That is a necessary business expense which we intend, certainly, to recoop from our business operations. We are not financially able to take that out of some store room that we might have and then pay it. We don't have that kind of money. We treat gross receipt tax as that figure, whatever it might be, as additional costs that we are going to be obligated in this contract. To us a dollar spent on gross receipt tax is the same as a dollar spent on lumber or materials or labor that goes into the building. It probably should be classified as an overhead expense as opposed to a labor and material expense, but nevertheless, it does exist and is a part of our total cost.

* * * *

CROSS EXAMINATION

BY MR. RICHARDSON:

Q. Mr. Ullery, how many years have you been in the general contracting business?

A. Myself?

[Tr. 135]

Q. Yes, sir.

A. Approximately nine years.

Q. So you are very familiar with how that business operates, I assume?

A. Well, I like to think so, but I have new things come up every once in a while.

Q. On the Ramah project, you figured in the gross receipts tax on the bids because the bidding documents instructed you to do so, isn't that correct?

A. Yes, sir.

Q. In fact, you probably figure gross receipts tax in any bid that you submit, didn't you?

A. Yes, sir.

* * * *

[Tr. 136]

* * * *

Q. Even though it may not have been itemized in the Phase I contract bids, were you aware of whether or not the School Board was aware that the gross receipts tax was one of those costs involved in your bid?

A. Well, I can't really say what the School Board was aware of. But I do believe that they were certainly aware of what the architect put on in the specifications. The specifications point blank said the general contractor will include New Mexico gross

[Tr. 137]

receipts tax.

* * * *

[Tr. 140]

* * * *

THE COURT: Well, for clarification for the

Court, Mr. Ullery, I would like to know; one, what your general practice and custom is in that regard.

A. We pass it on to the customer.

THE COURT: Secondly, what specifically was done in this particular case with Ramah School Board?

A. It was passed on to them. They paid it and then we in turn paid the Bureau of Revenue.

Q. You stated that Lembke is not in the business of selling materials. Did you mean that in the sense that you are not a retailer in materials, people don't walk in off the street and buy them?

A. That's right.

Q. But in effect, when you build a project, somebody is just not buying — Well, they are buying the entire project. In other words, if they are having to build a school, they are buying the entire school, which means they are buying materials and you in effect are buying those materials and incorporating them into the school. So you did sell those materials, didn't you?

A. Well, in that sense, yes. But I think the original question was did we sell them retail.

[Tr. 141]

Q. But that is what you meant by your answer when you said no, that you don't sell them retail? You only sell them as you incorporate them into the construction project that you build?

A. Yes, sir.

Q. And you do in fact make some markup on your materials because that is part of the cost that you take your percentage markup on, isn't it?

A. Yes, sir.

Q. So you do make some money when you handle materials?

A. Hopefully, yes, sir. It is our intent.

* * * *

[Tr. 144]

* * * *

Q. So, in other words, the way you handle the materials purchased in the Ramah School Project was not any different then would have been on the project performed for non-Indians on non-Indian property then?

A. That's right.

* * * *

[Tr. 160]

* * * *

REDIRECT EXAMINATION

BY MR. VAN AMBERG:

[Tr. 166]

* * * *

THE COURT: That's what I am not clear on. On the purchase of particular items, did you pass on a gross receipts tax as to the cost of those items or materials to the school district?

A. Not specifically on that item. But whether [sic, i.e., whenever]that item became a component part of the building and as such increased the value and increased our cost, then there was a 4% added on to the bottom of it or the percentage, the applicable percentage. It wasn't always 4%.

Let me put it another way. The sale from the supplier to the general contractor is not taxable.

[Tr. 167]

Therefore, our costs of the material is just that. It is the cost of the material. There is no tax on it but

when we then incorporate it into the project and bill the owner and the owner pays us, then it becomes part of our total receipts upon which the law says we will pay the gross receipts tax. But back to the original transaction of the material coming from the material supply man to the general contractor, there is no tax.

THE COURT: Thank you. I have no further questions.

* * * *

[Tr. 189]

* * * *

CHAVEZ COHO

was called as a witness and after first having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. GROSS:

Q. What is your name, please?

[Tr. 190]

A. My name is Chavez Coho.

* * * *

Q. What is your occupation? What do you do for a living?

A. Well, I have a stock, sheep and cattle, and I used to be the tribal councilman and also School Board President.

Q. How [sic, ie. how long] were you councilman for Ramah?

A. Thirty years.

Q. For the Navajo Tribe?

A. Yes.

* * * *

[Tr. 191]

Q. You are and enrolled member of Navajo Tribe, I take it?

A. Right.

Q. How long have you been on the Ramah Navajo School Board?

A. Past nine years.

Q. Does that correspond with the existence of the school board?

A. Right.

Q. Ever since the beginning, you have been on the school board?

A. Right.

Q. Before I go on, Mr. Coho, let me say this; if you have any trouble understanding my questions or those of anyone else, would you please say so and we will see if we can have an interpreter.

Do you feel you can continue to give testimony in English?

A. Sometime I mix up some words. I don't understand - I am not be to school, I just learn a few words.

Q. Mr. Coho, tell a little bit about what it was like to grow up in Ramah and why you did not go to school.

A. Well, why I have not been to school is there is no school in those years. Ever since fourth grandfather or grandmother requests a school for their children. All the communities never be to school. This is the reason that I never be to school. There was no school nearby the community.

Q. Did other people from the Ramah Navajo Community attend school in your generation; people as old as you?

A. Some, yes.

Q. Where did they go to school for the most part?
A. Over at Albuquerque Indian School. Some over here at the Santa Fe Indian School.
Q. There was no local school?
A. No local school.

* * * *

[Tr. 198]

* * * *

MR. GROSS: Mr. Coho, how important is the subject of education to the Navajo Tribe Council that you serve on?
A. Well, it is much important.
Q. Is it more important than certain other functions?
A. Right. Well, especially for the new generation.
Q. Mr. Coho, what effect has a [sic] tax that is the subject of this lawsuit had on the Ramah Navajo's School Board's ability to provide adequate facilities for your programs?
A. Well, earlier, when we requested to fill [sic, i.e., build] the buildings, we need more; but, you know, we don't have enough monies. If we would have this money, we would have more buildings to be built. Right now, our cafeteria is very small. This is not for the cafeteria, but it is used for the kitchen now. The kitchen should be separated from the school.
Q. What facilities do you think are needed that have not yet been built in order to have the kind of

[Tr. 199]

facilities you think you need?
A. Well, we need dormitory and other buildings.
Q. Is there any need for more classrooms?
A. Right.
A. [sic, i.e. Q] Is there any overcrowding at the pre-

sent time of students in the high school building or the elementary school?

A. Yes. In the high school.

MR. VAN AMBERG: [sic, i.e., MR GROSS] I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q. Mr. Coho, you testified that when you were growing up, you didn't go to school. There were BIA boarding schools available at that time, weren't there?

A. Not in our community.

Q. But you could have gone somewhere else to go to school, couldn't you? To a boarding school somewhere?

A. Well, it is already filled what has been told by the BIA. That's the only place, Albuquerque Indian School. It is filled and also the —

Q. Did you try to go to the Albuquerque Indian School [Tr. 200]

when you were a child?

A. No.

Q. There were some people who did go to this Indian boarding schools, weren't there?

A. Some, yes.

* * * *

Q. In fact, all of the buildings there, the whole [Tr. 201]

school facility, was built entirely with federal money, wasn't it?

A. Right.

Q. And tribal money wasn't used to construct that school?

A. No.

Q. When you got the first appropriations from Congress, you had certain plans about how much you were going to build with that money, didn't you?

A. Right.

Q. And then when the bids came in, you found you couldn't build nearly as much as you thought you could, isn't that true? There wasn't enough money to build as many buildings as you had planned?

* * * *

A. Yes. We not have enough money for what I request.

[Tr. 202]

It is more but we got less monies.

Q. When you found out you didn't have enough money to build all the buildings you needed during that phase, didn't you go to Congress and get another appropriation to build a gymnasium?

Then you went to Congress more times and got more money to do more buildings, isn't that right?

A. Right.

Q. Actually, the School Board started operating schools for the Navajo students there in Ramah in 1970, even before they had no facilities, didn't they? Didn't they use the facilities in the town of Ramah that they rented for a while?

A. You mean at the time the old school was being reopened? That is what you are talking about?

Q. Right. Yes.

A. Yes. We leased the old school building that was owned by the Ramah Community.

Q. So really the School Board has been educating local Navajo children ever since 1970, haven't they?

A. Yes, started. Yes.

Q. And they were doing that even before they were able to build their own school facilities?

A. You say even before?

[Tr. 203]

Q. Even before they built their own school, they were providing education to Ramahs in that school that they are renting in the town?

A. Well, there is a public school at that time running by the McKinley County School Board and also the State from Santa Fe.

Q. I am talking about after that school was closed about 1970, before you started construction of your new school, when the school board rented facilities in the town of Ramah to start its own school.

A. Yes. We have been working at the same time to reopen the old school on the side. We request to build new school in our community.

Q. But even when you had to use the old school, you were still providing education to the local Navajo children, weren't you?

A. Right.

Q. Then when you started building your new school facilities, you didn't build every building that you now have the first years, did you?

A. No.

Q. So it took a couple of years to get everything built?

A. Right.

Q. But you still started educating students in the

[Tr. 204]

meantime, didn't you?

A. Right.

Q. You say that the school board would like to build more buildings, dormitories, cafeterias, classrooms and all of that?

A. Yes.

Q. You have a cafeteria right now, don't you?

A. No. This kitchen we have now is not built for the kitchen. That is for the classroom.

Q. But it is being used for the kitchen and meals are served there, aren't there?

A. Right. Because there is no building.

Q. It is not a separate building but it is still operating as a cafeteria, isn't it?

A. Right. In the school building.

A. [sic, i.e., Q] You have kids going to school in some portable classrooms right now because you don't have permanent ones to take care of them, right?

Q. But they are still getting their education in those portable ones, aren't they?

[Tr. 204]

A. Right.

Q. Do you think you could build a dormitory, a cafeteria, more classrooms, with two hundred thousand dollars?

A. No. Not enough.

[Tr. 205]

Q. You said that education is a very important concern for the Navajos.

A. Yes.

Q. Aren't there other tribal functions that are important too? Like managing your natural resources, there is money for operate its programs, is that important?

A. Yes. First the peoples have to do their educating or get in some job, then they go to other kind of jobs.

Q. Isn't it important that the tribe have money to have some of these programs, though?

A. Right now, the tribes do not have enough monies for all their peoples.

Q. Then isn't it important that they develop ways to make money, like building tribal enterprises that will provide jobs and also make money for the tribe?

A. Yes. If the job is in the community, it helps.

Q. So if the Navajo developed an industry where they could employ their own people and provide jobs and the industry also brought in money to the tribe, it would be a real good thing for the tribe, wouldn't it?

A. Yes

* * * *

[Tr. 207]

REDIRECT EXAMINATION

BY MR. GROSS:

* * * *

[Tr. 208]

Q. Did you plan, when you opened your school in 1970, did you plan to use that abondoned facility in Ramah Village for very long?

A. Yes.

Q. Did you understand my question?

A. Well, the way I got you is that do we plan to take old building to reopen the school.

Q. I am asking you, was it the School Board's intention to stay there very long?

A. No. It is only four years.

Q. What was your plan?

A. Well, our plan is to build new school in our community or supposed to be.

Q. This lawsuit concerns some two hundred thirty-two thousand dollars in tax money that the School

Board paid to Lembke Construction Company which in turn paid the money to the State. Do you think that this two hundred and thirty-two thousand dollars, if you got it now, would significantly help provide more facilities of the type that you said you needed?

A. Yes. I believe so. Some year would be filled up. [Tr. 210]

* * * *

ANN SMITH

was called as a witness and after first having been duly sworn, testified upon her oath as follows, towit:

DIRECT EXAMINATION

BY MR. GROSS:

Q. Would you tell us your name?

A. Ann Smith.

Q. Where do you reside?

A. Santa Fe.

Q. What is your occupation?

A. Anthropologist.

Q. How long have you been an anthropologist?

A. Since the 1930's.

Q. What is your educational background?

A. I took my undergraduate work at Cornel University and got a M.A. and Ph.D at Yale University.

Q. Have you written any books or monographs or articles in the field of anthropology?

A. I have and I have in probably the last part of the work I was doing, I was primarily concerned with cross cultural education.

Q. Have you at any time made studies of Indian education in New Mexico?

A. In 1966, '67, the University of New Mexico asked me

[Tr. 211]

to do a study of Indian education in New Mexico for the Department of Government and Political Science there which I did and which they printed.

Q. Have you kept up with the field of Indian Education in New Mexico since that time?

A. I have indeed. I was very involved in the whole struggle of the Ramah people to secure their own school. At the present time, I am a member of the New Mexico Commission on Indian Affairs and a member of the three member at Hope [sic, i.e., ad hoc] Committee on Education of the Commission. The other two members, a Navajo and a Pueblo.

* * * *

[Tr. 218]

* * * *

Q. What is the importantance [sic] in terms of quality education for indians in the concept of community control?

A. It is terribly important because unless they have some control over the education of their children, they are not going to get any better education than they are today. If we are ever going to have the level of income, of health, of opportunity raised for our Indian children, it looks to me as though we are going to have to have the Indians in

[Tr. 219]

control of schools, because the anglos have failed dismally.

Q. You are familiar with the Indian Self-Determination Policy, are you not?

A. Yes, I am.

Q. What would you say in terms of your past estimate

concerning the rightness or wrongness of that policy?

A. Well, I think it is definitely right. I mean, Indians have as much right as any of the rest of us to have control over our future destiny and the destiny of our children. The destiny of our children and our ability to survive and live in this world depends on the kind of education they get.

[Tr. 221]

* * * *

Q. Is there a connection in your view between education and the self-government of Indians?

A. Of course. You can't have self-government, unless you have informed and educated citizenry and you can't have efficient self-government or good self-government without that. I think it terribly important that the Indians, and particularly the Navajos, because of their large numbers and their widely scattered areas, that it is very important that their Indians should be educated and they feel that education is more important than anything else.

* * * *

[Tr. 224]

* * * *

Q. Doctor Smith, are educational facilities important in any way to the quality of education programs conducted in them?

A. I certainly think they are. I compare the old Ramah Navajo High School with the new Pine Hill point. It was very difficult to conduct class in rooms where the rain was leaking through the roof and there were no adequate facilities. Now, Pine Hills is a very different matter, and I am sure, I know that the educational proceedings going on there are

much superior because of the better facilities. You also need more room, more facilities, more books, more teaching tools, so the money is an important part.

Q. In your studies of education, have you taken this kind of economic factors in account in terms of facilities in particular?

A. Yes, I have indeed. I can tell you where the best schools and the worst schools are in New Mexico. Those that have Indian children.

Q. Would the lack of sufficient numbers of classrooms have an adverse effect in your opinion on the ability of the Ramah Navajo School Board to conduct a sound educational program?

[Tr. 225]

A. Very definitely, because that limits the number. I think that more classrooms you are able to have a smaller teacher-student ratio and that also makes for better education.

Q. If I told you as a hypothetical that there were not enough classrooms at the new facility at Pine Hill, would you have an opinion, and if so, what is it as to the effect of the loss of two hundred thirty-two thousand dollars on the ability of Navajo Indian Tribe to make its own laws and be governed by them?

A. Well, I think it would certainly have an effect on the education of the children because if you have too many children in a classroom, you cannot do as good teaching as you can if you have a smaller number of pupils per teacher. Therefore, and I don't know how many classrooms you could build with that today, but I think the more the merrier, the better for the children.

Q. What about the same question in respect to an adequate cafeteria?

A. The same thing.

Q. What about in relationship to an adequate school administration building?

A. I think that is very important.

[Tr. 226]

Q. What about the same question in relationship to adequate landscaping and site planning at a school facility?

A. Well, they always help. All we have to do is look at our own high school here in Santa Fe to see how important it is or how important the lack of it is.

Q. I have no further questions.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q. You were just talking about the importance of adequate classrooms and this sort of thing for quality of education. Do you think there is a significant difference in the quality of education that can be derived in a portable classroom as opposed to one that is affixed to the ground providing the same size and space?

A. I haven't had enough experience visiting portable classrooms to really make an adequate judgment on that point. I would say from the teacher's point of view, particularly, it would be very difficult, I would think, to teach in a portable classroom.

Q. Have you seen any of the portable classrooms out at Ramah?

[Tr. 227]

A. There was one out there before they moved to Pine Hill, wasn't there? I remember one. We have had them here. I was for three years a member of the

committee, a member of the parent's advisory committee for the Follow Through Program, so I am familiar with the use of portable classrooms here in Santa Fe for low income children who are in the Follow Through Program. I know teachers did not feel that they really could do as good a job in the portable classrooms.

Q. Have you seen the school administration building out at Ramah?

A. The new administration building?

Q. The administration building that is being used at Ramah?

A. I haven't been there since the dedication in 1975. Not to the new building.

Q. When the dedication in 1975 occurred, was the administration building a portable tin building?

A. I don't remember. I don't think I saw it. We were all so busy looking at the classrooms and the buildings and there were many, many people there that day. I don't recall seeing the administrative headquarters at all.

Q. Do I understand your testimony to be that better

[Tr. 228]

education would be obtained for the Indian School if they didn't [sic, i.e. did] have a cafeteria building?

A. Well, I think all children need to be fed and fed well.

Q. If you have a cafeteria but it is not a big cafeteria so you have to stagger the lunch hours, do you think that would affect the quality of education in the school?

A. I think everything in the school environment should

be part of the child's education and it is and it can affect them, either adversely or favorably.

Q. So a paved parking lot is a big influence on education?

A. There is a big problem out at Pine Hills, isn't it?

Q. Would you answer my question?

A. Well, I really hadn't thought about it.

Q. Well, take your time and think about it and answer it, please.

A. It would apply only, of course, to older students-wouldn't it - who had cars or drove faculty cars.

Q. You are saying that every aspect of a school facility significantly affects the quality of education and some schools have paved parking lots and some don't.

A. Let's put paved parking lots down at the bottom of

[Tr. 229]

the list, can't we?

Q. So some things don't have a very significant affect on the quality of education, do they?

A. Some things have more; some things have less.

Q. So it is all very qualitative, isn't it?

A. No, it is a matter of priorities, the most important thing, down to the minimally important things.

Q. Do you think the Pine Hill School down at Ramah is a good school?

A. I think it is great.

Q. And a good quality of education is being provided there now?

A. I do.

Q. I believe you testified that the Navajos are very good [sic, i.e. poor] people?

A. Economically, yes.

Q. And economic development is something that

would be very desirable for the tribe in order to provide for a better standard of living for their people, wouldn't it?

A. It would, providing it doesn't ruin their land.

Q. So economic development is also an important aspect of tribal self-government, isn't it?

A. Of course.

[Tr. 230]

Q. There are other aspects of tribal self government which are important to the quality of life for the people such as police protection and having good roads and having good health care services, being able to provide social welfare services, all of those are important aspects of self-government, aren't they?

A. Yes. If you are going to have self-government operated by the Navajo, you are going to have to have educated Navajos.

Q. I believe you testified there were approximately twenty-five thousand Indians in the public?

A. Those figures we got from the State Department of Education of New Mexico.

* * * *

* * * *

Q. Are you aware that school buses now run between Ramah and Zuni High School?

A. Between the town of Ramah?

Q. Yes.

A. Yes. But that's a paved road all the way, isn't

[Tr. 232]

it?

Q. I believe so.

* * * *

REDIRECT EXAMINATION

BY MR. GROSS:

[Tr. 234]

* * * *

Q. What I am trying to get at is this, are you aware that there are other governmental functions being performed by the Ramah Navajo School Board in addition to education?

A. Well, they are all members of the Ramah Navajo Chapter, are they not, and as thus part of the total Navajo tribal government.

Q. Yes.

A. Yes.

Q. But are you aware there is a clinic at the school site?

A. No, I do not know about the clinic.

Q. You do not know about it? Ramah lacked a school until this one was built, at least there is no debate about that. Was this lack of a school within the Ramah Navajo Community in any way part of this national policy of dissimulation [sic, i.e., assimilation] that you were referring to before?

A. I think so because when they closed that small school that did exist at Ramah, the families had to choose between sending their children away to boarding school, sometimes hundreds of miles away, or let them drop out of school. I think this is a tragic choice for a family to have to

[Tr. 235]

make because those children who were sent away to school lived in a completely different environment, completely different culture, and the attitude was shape up and get rid of all those Indian ways of thinking and doing and being and I think it was

very detrimental to the children who went away to boarding school.

* * * *

[Tr 237]

* * * *

THE COURT: Doctor Smith, I have a few questions.

Does the State of New Mexico provide any assistance or materials to the Pine Hill School?

A. In the public schools, I think they do. At Ramah I believe they do not. Is that correct, Mr. —

THE COURT: You can't ask somebody else. I am just asking you; if you don't know —

A. I don't think they do in Ramah; I don't think they get the money which is available for school lunches, for textbooks, things of that kind which do go to Indian children in our public schools.

THE COURT: Do you feel definitely one way or the other whether the State does provide any of those materials or assistance?

A. For the Ramah School?

THE COURT: Yes.

A. I think it does not.

THE COURT: Do you know whether they get textbooks or any part of that?

A. They do not get textbooks and this has surprised me because I have always understood that the fees for grazing land in the State from the federal government went to provide our free textbooks for the State public schools, but I don't believe Ramah gets free textbooks.

THE COURT: Do they get any assistance for school lunches or —

A. I don't believe so. Not from the State.

THE COURT: What about visual aids or other materials other than textbooks?

A. That I couldn't speak specifically of.

THE COURT: Do you know whether the State Department of Education expends any expertise or assistance, technical assistance?

A. I don't know what they do now, but when we were trying to get Ramah School started, we asked and asked for techinical [sic] assistance and advice but we got turned down.

THE COURT: I have no further questions.

* * * *

[Tr. 239]

RE-DIRECT EXAMINATION

Q. Dr. Smith, what was the State's Department of Education attitude towards the creation of the Ramah Navajo School in 1970?

A. It was extremely antagonistic, I felt so. I wrote several letters to the paper about it.

Q. Would you please elaborate on that. What was the genesis of the hostility and what happened?

A. Well, just about the time the school opened, the Superintendent of Public Instruction announced that he would sue any parents who sent their children there because it was not an accredited school and as the Ramah School Board had tried over and over again and had responded to every question that the Superintendent of Public Instruction wanted about curriculum, about faculty qualifications, so on and so forth. It had an approved plan of curriculum, so on and so forth and the Superintendent of Public Instruction made very rigid requirements. One, that all teacher aids

who are going to help with teaching in Navajo language and Navajo culture, Navajo crafts, that they all have a high school education. Well, as the educational level in the Ramah was three years

[Tr. 240]

of schooling, this was not possible. So this threat, this empty threat, I may say, by the superintendent of public instruction frightened many parents. Then I think the faculty and the school board had worked to plan a basketball team which is very important to teenagers and had set up a schedule of games. Two days before the first game was to take place, the Superintendent of Public Instruction said that no accredited school could play Ramah because it was not accredited and we had that kind of obstruction time after time, conference after conference, but we did not get - the school board had asked the State Department of Education to send someone over to help them learn what the School Board could do, how they could do it, they never got any help from the State Department of Education at all.

Q. How do you know all this?

A. I was there. I went to a lot of School Board meetings.

Q. Were you in attendance at any meetings between the Ramah Navajo School Board and the Superintendent of Public Instruction?

A. Yes, I was indeed.

Q. What were the circumstances of that meeting?

[Tr. 241]

A. To try and iron out some of these difficulties and get the approval which would enable the school to

provide things for the students such as a basketball schedule.

Q. Did the approval eventual come?

A. I think it did, but years later.

Q. Are you familiar with whether any political support was necessary from high above in order to help get the approval?

A. I think there was.

Q. I have no further questions.

THE COURT: Thank you, Mrs. Smith.

* * * *

[Tr. 241]

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JOHN C. MARTIN

was called as a witness and after first having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

[Tr. 242]

BY MR. GROSS:

Your Honor, before the witness begins his testimony, I would like to explain that Mr. Martin has been in the courtroom for many of the proceedings up until now but by agreement with Counsel for the Defendant, we have permission to proceed.

Q. Would you please state your name.

A. My name is John C. Martin.

Q. Where do you live?

A. I live at Pine Hill; Ramah, New Mexico.

Q. Are you a member of any Indian tribe?

A. I am a member of the Navajo Tribe.

Q. Are you employed?

A. I am employed by the Ramah Navajo School Board.
Q. In what capacity?
A. I am the executive Deputy Director which is assistant to the executive director under Ramah Navajo School Board.
Q. How long have you been in that capacity?
A. I am fairly recent in this position; about a little over a month and one-half.
A. [sic, i.e. Q] Are you familiar with the programs of the Ramah Navajo School Board?
A. Yes.

* * * *

[Tr. 248]

* * * *

Q. You talked about the school board having a budget of about 7.2 million dollars; is this money in the budget all federal money? Does it come from the federal government?
A. No.
Q. Was the composition of that money — Where does it come from?
A. Like I said, the Ramah Navajo School Board, as an incorporated body, is able to do many things such as it can be an agency to apply for grants. We have grants that go into this budget. Grants such as through HEW, bilingual program is through a grant and so forth.
Q. But that grant money isn't that federal grant money?
A. [sic, i.e. Q] Yes. Is there any money in the 7.2 million budget that is not federal money? That comes from the sources other than the United States government or federal agencies?

A. If there is, there is very little that comes from the tribe, the Navajo Tribal government.

Q. Almost all of it, then, in other words, comes from the federal government, isn't that right?

[Tr. 249]

A. Yes, sir.

Q. In fact, you don't know if any comes from the tribe, do you?

A. Yes. The scholarship money comes from the tribe.

Q. Is there anything else that comes from the tribe?

A. I can't say offhand.

Q. How much money is the scholarship program? Do you know?

A. I can't give you a figure on that.

Q. Do you have any approximation?

A. I would say about a hundred thousand.

Q. A hundred thousand dollars a year?

A. Yes.

Q. I have no further questions.

THE COURT: Mr. Martin, I have just a few questions.

To your knowledge, does the State of New Mexico provide any materials or technical assistance in any way to the school?

A. No, sir.

* * * *

[Tr. 250]

CAROLYN LINDBERG

was called as a witness and after first having been duly sworn, testified upon her oath as follows, to-wit:

* * * *

DIRECT EXAMINATION

BY MR. RICHARDSON:

[Tr. 266]

* * * *

THE COURT: Counsel, I am going to recognize Mrs. Lindberg as an expert in the field of economics and in the field of State Taxation and Revenue and physical expenditures. I would note that Rule 702 of the Rules of Evidence, that an expert may testify to matters within his or her field of expertise if they are relevant to the issues of the case and if there are matters which an expert in that particular area customarily relates upon in arriving at their professional opinion.

BY MR. RICHARDSON:

[Tr. 267]

Q. Mrs. Lindberg, did you make a study of State Expenditures on behalf of Ramah Indians?

A. Yes.

Q. Did you arrive at a conclusion as to whether there were any state expenditures on behalf of Ramah Indians?

A. Yes. There definitely are State expenditures on Ramah Indians.

* * * *

BY MR. RICHARDSON:

Q. Were there categories of State expenditures on Ramah Indians?

A. Yes. The categories were the direct expenditures who [sic] were for the benefit of Ramah Indians and then there were indirect expenditures who [sic] were for the benefit of all of Ramahs, for the citizens.

* * * *

[Tr. 269]

* * * *

Q. Are there any areas of State expenditure on behalf of the Ramah Navajo Indians that you discovered in the process of making a study on the State expenditures on Ramah Navajo Indians?

A. Yes. I found a number of areas, public and higher education was one notable area. The second major area in terms of dollar value of services rendered was exactly in the taxation area, in the rebate program, close to forty-five thousand dollars roughly to individual Ramah Indians and that is a figure that will rise substantially next year when we have our forty dollar per head food tax exemption rebate.

* * * *

Q. Speaking first of public education, how did you [Tr. 270]
derive your figures you arrived at for public education?

* * * *

A. The expenditure figures were derived from the annual report of the Public School Finance Division. There was a computation made in terms of the per-pupil expenditures applied to the number of students that we could determine attended the public school at Zuni from the Ramah Reservation.

Q. What was your source of information as to how many Ramah Navajo students attended public schools?

A. I spoke to Charlie Johnson at the Zuni School.

Q. Who is Mr. Johnson?

[Tr. 271]

A. He is the principal.

* * * *

Q. Are you aware of other Ramah students attending public schools other than at Zuni High School?

MR. VANAMBERG: Objection, your Honor, unless there is some foundation made as to the source of her awareness.

THE COURT: If you know of your own personal knowledge as distinguished from speculation --

A. No, I don't.

Q. Did you attempt to call every public high school in the state and determine whether they had any Ramah Navajo students?

* * * *

[Tr. 272]

* * * *

A. Can I say what I did do?

THE COURT: Yes.

A. I attempted to determine the bus route from Ramah which goes to the Zuni school, so the presumption on my part was that that is where they went if they went to public school.

Q. Did you inquire of other public schools to see if there were Ramah indians going there?

A. No.

Q. Do you recall what benefits you determined, what direct benefits you determined were derived by Ramah Navajo people from public education in lower level schools, secondary schools and below?

A. The students in question-seventh through twelfth graders, and I determined that on an average per pupil basis, roughly thirty thousand dollars would be the measurement of the benefits.

THE COURT: I don't understand your last

statement. Are you talking about thirty thousand dollars per year per pupil?

A. Yes, I'm sorry, Your Honor. Yes. No, not per pupil.

THE COURT: Can you explain your last state-

[Tr. 273]

ment?

A. Yes. By calculating the average expenditure of State funds on students in that school district, I simply multiplied that by the number of Ramah students.

THE COURT: What did you determine?

A. The total came to roughly thirty thousand dollars annually.

THE COURT: For all the students?

A. For all the students, yes.

Q. Did you investigate expenditures on behalf of Ramah Indians in the field of higher education in the State of New Mexico?

A. Yes, I did. I contacted the tribe on two occasions and received no information from them. I was able to obtain from the Board of Educational Finance a determination that there are three students who graduated from Ramah High School currently attending higher education institutions of the State of New Mexico.

However, I was not able to find out how many Ramah students from other high schools were attending institutions of higher education. The Board of Educational Finance statistics are in terms of origin, high school origin for the students.

[Tr. 274]

Q. Based on that information, were you able to arrive

at an approximation of how much State expenditure was involved in educating those two Ramah students?

A. Yes. For those three students, again based on average State general fund appropriations per student at the institutions in question, I calculated the value to be about five thousand for those three students for a single academic years.

Q. I believe you stated the information you had came from the information on record as to students graduating from Ramah High School, is that correct?

A. That's correct.

Q. So no part of the sum you have calculated would involve Ramah Indians who might have graduated from other high schools, is that correct?

A. No. They are not included.

Q. Did you find any evidence of State expenditure in the field of criminal defense of indigent Navajo Indians?

A. Yes, I did. In that case, the Public Defender's Office has three attorneys under contract to handle indigent cases for them in McKinley and Valencia County. These three attorneys were asked by the Public Defender's Office to review their records to determine the number of hours spent defending [Tr. 275]

these cases and the one thousand dollar estimate service value is based on their records.

* * * *

[Tr. 276]

BY MR. RICHARDSON:

Q. Did you determine any State expenditures in the

area of public assistance on behalf of Ramah Navajo Indians.

A. Yes, I did. In this case, I went directly to the welfare office and viewed the welfare roles myself. I must add that in that case they do not denote ethnic origin on the roles. I was able to determine how many cases were from the Ramah zip code area. Some of them may not have been Indian. In most cases, you would have to go by names and I recognize what the difficulty there is. I found about forty-eight cases on the roles in September and October and I based an estimate of State funds involved in that case on annualizing the number of cases for those two sample ones. I then deducted the amount that is federal matched - The federal government matches, I think it is about seventy-eight percent or so, then they reimburse the State for part of its match. I took all the federal funds out and left only the State contribution on those cases and the total came out to be, I think it was five or six thousand dollars.

Q. Did you include all the recipients that had a Ramah zip code in that case?

[Tr. 277]

A. In that case I did.

Q. Did you discover any State expenditures in the area of tax rebates?

A. Yes. In that case, of course, we had access to our own department computer records and we actually did a dump on the low income tax rebate paid to — Again it was a zip code sort to that particular zip code for low income tax rebates and also for the medical rebate and using the number of exemptions that were reported under the medical rebate,

we multiplied by thirty dollars to get the 30 30 rebate. In that case, because the dollars were quite large, I reduced it by fifteen percent as a rough guess correction for the people who would not be Ramahs.

Q. Do you recall approximately the level of expenditure?

A. All three of those together came to about forty-five thousand but I don't recall the components.

Q. All three? Are you speaking —

A. Low income, the medical and the 30 30 rebate, the three major rebate programs.

Q. What year was that for?

A. That, unfortunately, was for 1976. We have had some well publicized trouble with our '77 returns and subsequently, we cannot get as good access to

[Tr. 278]

computer read-outs for that year. I would say that specially in view of the fact that we are raising the per exemption rebate to forty dollars, that is not a misleading picture of the rebate. In fact, it is probably conservative.

Q. Did you discover any State expenditures for the Office of Indian Affairs?

A. Yes. In that particular case, State budget for the Office of Indian Affairs physical [sic, i.e., fiscal] year is about $84,000.00. Again, I had to prorate that to the Ramahs on the basis of their proportion of the total Indian population in the State.

Q. What did you base that on?

A. I based that on a report from the Office of Indian Affairs and from the Office of Revenue sharing Indian population statements for the year 1976.

Q. How many Ramahs were you assuming there were?

A. The first indication I had from the Office of Indian Affairs were that there were fourteen hundred Ramahs. I have had higher estimates and I used that particular one to keep the numbers reasonably conservative.

Q. Assuming if there were a larger amount of Ramahs, then your figures would have been higher?

[Tr. 279]

A. That's correct.

Q. Could you please explain what you mean by indirect expenditures?

A. Those are basically expenditures that you simply can't reasonably assign to an individual and some differentiate a basis which somebody else has. How can you say that Joe Blow benefited five hundred by national defense while Jane only benefited two hundred. There has to be some basis to that. we [sic] simply allocate them on a per capita basis.

Q. Is it fair to say that indirect expenditures are then expenditures that are for a common good?

A. Yes.

Q. What indirect expenditures did you feel could be tied into the Ramah Navajo Indian chapter?

A. Well, the most important one of all was highways. Then, in varying amounts, the court system, the public safety system, including the correction institutions, public health and environmental protection. Those were the main ones.

A. Do you recall an approximated figure of what the direct expenditures were for the benfit [sic] of the Ramah Indians?

A. Roughly three hundred thousand dollars.

Q. Did you base your estimate of the amount of

[Tr. 280]

money spent for highways on any particular road or the State highway system in general?

A. No, I didn't, because there are twenty miles of State Road 53 in the area that is being maintained by the Highway Department. It didn't seem to me like that twenty miles of road was really being maintained basically for the Ramahs on the one hand, but on the other hand, it doesn't seem like they benefited any less than any other citizen from driving on all the other miles in the State. So instead of saying okay, we will take the annual budget for that twenty miles and allocating that for the Ramahs, I simply allocated the Highway Department on a per capita basis.

Q. Did you come up with a total estimate of the indirect and direct expenditures by the State of New Mexico on behalf of the Ramah Indians?

A. Well, it would be the three hundred thousand plus ninety thousand. Three hundred ninety thousand.

Q. I have no further questions.

CROSS-EXAMINATION

BY MR. VAN AMBERG:

Q. Mrs. Lindberg, turning to the area of public

[Tr. 281]

education, what was the source of your information regarding your conclusion in that area?

A. I used the annual report of the public school finance division which contains budget and expenditure information on all school districts in the State. As I indicated before, I used the enrollment based on the estimate that Mr. Johnson provided.

Q. Do you have any background or training in the area of education?

A. No.
Q. Or State education in particular?
A. No.
Q. Are you aware whether the school district in which the Gallup-McKinley public high school at Zuni received monies from Johnson O'Malley?
A. Yes.
Q. Do you know how much they received on that?
A. I don't know how much they received on that.
Q. Do you know whether they received money under Public Law 874?
A. Yes, I do.
Q. Do you know how much money they received?
A. I don't remember. That was all available in the report?

[Tr. 282]

Q. In which report?
A. In Public School Finance Division report.
Q. But you didn't include it in your report?
A. No, because I was working on State expenditures only.
Q. But you didn't include any money which the school district received because Indians were going to that school, did you?
A. I used only state funds. It is recognized that there are additional funds, but I didn't use it.
Q. There are additional funds that go to this district because Indians attend them?
A. That's right.
Q. But you did not include them in your report?
A. No.
Q. Are you aware whether the Gallup-McKinley Public High School — What is the name of the school?

A. Gallup-McKinley.

Q. Gallup-McKinley, yes. Do you recall whether they received monies based on Title I?

A. I am sure they did.

Q. Do you know how much?

A. No.

Q. Do you recall if they received monies based on Title VII?

[Tr. 283]

A. I don't know.

Q. Are you familiar with the Indian Basic Education Act?

A. I know there is one.

Q. Do you know what it says and what it provides?

A. No.

Q. Or when it was passed?

A. No.

Q. Is it my understanding that you determined that there were approximately thirty-five Indian students attending the high school out there because of your observations relating to bus route, is that correct?

A. Well, I know there was a bus route, yes, but I didn't base it off the bus route. I inquired directly.

Q. What was the role of the bus route? I don't think I understood your testimony.

A. The presumption was that no other public school district was running a bus route to Ramah for the purpose of busing children to some other school.

Q. And it goes — Actually the bus is at the village of Ramah, isn't that correct?

A. I think it has a whole route through the area.

Q. Do you know what the route is?

[Tr. 284]

A. I don't know.

Q. Do you know whether it goes in the Reservation?

A. Yes, it does.

Q. You don't know where, though?

A. No, I don't.

Q. So this figure of thirty thousand five hundred dollars is just your estimation of the amount of money spent by the State in the school district?

A. For those students, yes.

Q. Allocated to thirty-five students?

A. Yes.

Q. There is nothing contained in your computation which relates to any federal monies which go to the school district because of the attendance of Indians?

A. No. In all cases, I tried very hard to exclude federal funds from these calculations.

Q. Relating to higher education, how did you determine that there were at least three Ramah Indians who were enrolled at the University of New Mexico?

A. The Board of Educational Finance every Fall receives a list from each and every university. They call it their student file and it tells them the number of students by high school of origin enrolled in each university by high school of origin, by schools in New Mexico and for students

[Tr. 285]

outside of New Mexico.

Q. Where was your high school of origin that you used for your study?

A. Ramah.

Q. Ramah only?

A. Yes.

Q. Are you aware that on occasion employees of the Ramah high school district or school board have children that attend the high school there?

A. If there were Anglo or non-Indian children, then I was not able to make that distinction.

Q. So you don't know? All you know is that there are three graduates of the Ramah High School, the Pine Hill School?

A. Yes. I might add that since that school is rather new, there are likely students from other high schools such as Zuni High.

Q. You are unable to determine that?

A. I was unable to determine that. The figures are available from the tribe but they didn't tell me.

Q. Did you ask them for the figures?

A. No.

Q. Did you send them interrogatories?

A. No. I just asked them.

* * * *

[Tr. 287]

* * * *

Q. Are you aware that most Indians, if not all Indians who attend the University of New Mexico are on scholarship in some form or another?

A. I was making that presumption in making the request even, yes.

Q. Either from the BIA or the Navajo Tribal Council?

A. Right.

Q. The Public Defender, did they tell you the number of cases that they handle for Ramah Navajos?

A. No.

Q. Did they tell you how many they won and how many they lost?

A. No.

Q. Did they tell you the number of Ramah clients that they have?

A. No. I did not receive detail on that.

Q. Or the fee per hour that they considered appropriate?

A. No.

Q. Or whether or not in fact they know whether your clients are enrolled members of the Ramah Navajo Chapter?

A. I don't know how the attorneys made the determination.

[Tr. 288]

* * * *

Q. On the public assistance, you said you determined the number of Ramah recipients by examining the names and the zip code, is that correct?

A. That's correct.

Q. What in particular did you determine about the names which would —

A. I'm sorry, I did not discriminate among names. Some of them are obvious. The majority of my impression, which you may want to throw out, was that most of them were Ramahs, going by the name; but the forty-eight cases represents the entire population from that particular zip code.

Q. Do you know what area the zip code covers?

[Tr. 289]

A. Yes. It is the Ramah post office and I am not sure which.

Q. Ramah Village?

A. 87321. It covers more than the village, I believe.

Q. You realize the village is not part of the reservation?

A. Right. I know there are people there. Our estimate is that there are two to three hundred non-Ramahs

in the area, then fourteen hundred Ramahs and subsequently it would be reasonable to reduce that figure by ten, fifteen percent.

Q. Is that reflected in here?

A. No, it is not.

* * * *

[Tr. 290]

* * * *

Q. Similiarly, when you computed the tax rebates, you also used the zip code?

A. Yes. In that case, we did reduce the final amount by fifteen percent.

Q. But you don't know what the legitimate reduction would be? In other words, you don't have the precise figures as to who was Ramah Navajo and who wasn't?

A. No. This was an estimate.

Q. Did you determine at all how much money the State of New Mexico saved by the Ramah Navajo people going out and obtaining federal money and building their own high school and elementary school facilities on the reservation?

A. No. I have made no estimate. You would have to make an incalculable number of assumptions about what we would have spent if we had spent it.

* * * *

[Tr. 291]

* * * *

Q. Relating to your indirect expenditures, have you made any investigation into the actual extent of public safety efforts on the part of the State in relation to the Ramah Navajo?

A. Well, a very large portion of that is actually the

corrections facility and it is difficult to say that the fellow in the penitientiary is the one

[Tr. 292]

who benefits. I think you will have to say that society as a whole is the major beneficiary and that is why it is actually allocated on a per capita basis.

Q. Well, you have got correction facilities in a separate category.

* * * *

[Tr. 293]

* * * *

Q. But when the Ramahs leave the reservation, they are just like anybody else. They pay gross receipt

[Tr. 294]

taxes, income taxes?

A. Yes.

Q. And the corrections facilities, that is basically the penitentiary and society services?

A. And all the others.

* * * *

Q. Mrs. Lindberg, let me show you what has been marked as Plaintiff's Exhibit 47 and ask you if you can identify that?

A. This is a copy of the annual report of the Public School Finance Division.

* * * *

[Tr. 295]

* * * *

Q. Is that basically the document you used in compiling your statistics and opinion relating to public education benefits provided the Ramah Navajo?

A. Yes.

Q. Referring to Plaintiff's Exhibit —

At this point, Your Honor, I would move for the admissibility of Plaintiff's Exhibit 47 into evidence.

MR. RICHARDSON: I have no objection.

THE COURT: There being no objection, Plaintiff's Exhibit 47 is received into evidence.

BY MR. VAN AMBERG:

Q. Referring to Plaintiff's Exhibit 47, Mrs. Lindberg, would you explain to me and the Court exactly to what you referred in compiling your data?

A. Yes. There is a table in here that relates to revenues budgeted for physical [sic. i.e., fiscal]] '78, '79 and I used the figure appearing under the McKinley-Gallup School District right here.

* * * *

[Tr. 296]

Q. Does it show the amount of money received through the Johnson O'Malley Program?

* * * *

Q. What is the figure there?

A. A million, one hundred forty-six thousand.

Q. Referring to C-2, on Page C-2.

A. That's correct.

Q. Do they have the amount of money received for Public Law 874?

A. Yes. That was back on the other table.

Q. It is listed under federal sources.

Q. That is the amount under Public Law 874 Gallup-McKinley?

A. 599,370.

Q. What about Title I? Is there an indication in there

[Tr. 297]

as to how much Title I received?

A. It is not broken out separately, Your Honor. It is included with a variety of other federal projects.

Q. What other projects are included?

A. Migrant workers, SAFA, whatever that is. Title III IV, VI, VII of the elementary and such Secondary Education Act. Do you want them all?

Q. Yes, if you would just say what they are.

A. Okay. Right to Read Title VII, Title VII ESAA, and then some LEAA funds, Adult Basic Education, Zuni Speech Therapist, Title IV, i.e. National Endowment for Humanities, Ute Conservation, Community Development, National Institute of Education Title IX and miscellaneous 1019.

Q. How much for all of that?

A. Two million, five hundred eighty thousand, two hundred ninety-three dollars.

Q. Is there a separate category for Title VII or was that included?

A. I think that was included. That was included.

Q. Are there any other programs for which the Gallup-McKinley School District received federal funds which to your knowledge relate to the fact that Indians are in attendance in schools in that district?

[Tr. 298]

A. I can't tell from this report.

Q. Did you do any further investigation into federal contributions or federal monies that were received by the school district other than what is contained in Plaintiff's Exhibit 47?

A. No.

Q. So to summarize some of these statistics that you cited, there was approximately about nine and one-half million dollars received by the Gallup-McKinley School District?

A. The numbers are there.

Q. They speak for themselves?

A. Yes.

[Tr. 299]

* * * *

Q. Are you familiar with State Road 53?

A. I was on it about ten years ago.

Q. In preparation of your report, did you have occasion to look at the map and determine where exactly State Road 53 went?

A. Yes.

Q. We all know it does, at least in part, travel through part of the Navajo Reservation.

A. Yes.

Q. About two and one-half miles from the turnoff to the Pine Hill Scholl, however, there is a national monument there, isn't there?

A. Yes.

Q. What is that?

A. That is the El Moro. It is there somewhere in

[Tr. 300]

that area.

A. Yes.

Q. Then the road continues past that to the Pine School on to Zuni, right?

A. Right.

Q. Then continues from Zuni on to Arizona?

A. Sure.

Q. So you are not contending that this is a road exclusively for Navajo purposes?

A. Absolutely not. I think I made that point. It would be a silly thing to say.

Q. The road from State Road 53 to Pine Hill School, are you familiar with that road?

A. No, I do not.

Q. That is not maintained by the State Road Department?

A. They didn't say so. The only roads they confessed to was 53.

Q. So you are not maintaining that the State has participated in either the maintenance or construction of the road leading from State Road 53 to Pine Hill School?

A. If they did, I am not aware of it.

* * * *

[Tr. 301]

Q. Your health hospitals and institutions you attribute forty-six thousand two hundred dollars. How did you derive that figure?

A. Well, the first thing I did there was draw a line and say that hospital services are basically provided to the individual and not to society at large. I mean, it is — We wouldn't have a State hospital if everybody didn't benefit, but the major beneficiaries are the people who are actually there. I did not get through all the State institutions. I did check with some. They had nobody that they could identify as a Ramah Indian, so I just took all State hospitals out and allocated none of that to the Ramah Tribe. So basically, you have public health which maybe they get their shots, immunization shots from the APS. Environmental services, I did allocate to them likewise.

[Tr. 302]

* * * *

Q. Are you aware to the extent in which the Navajo or similarly situated Indians actually use any State

supported facilities as opposed to federal supported?

A. I am aware that they use very little.

Q. They actually use less than the non-Indian population?

A. Of course. That is why I made that adjustment.

Q. You have category transportation.

A. That is basically the Highway Department.

Q. To recap, or referring to your summary, you have a figure of thirty-six thousand five hundred dollars, but that does not take into account the amount of federal government money received by the school district?

A. No federal funds have been figured.

* * * *

[Tr. 303]

* * * *

Q. The public defender, that information was basically

[Tr. 304]

an opinion given to you by some member of the Public Defender's Office without any supporting data?

A. I didn't ask for backup.

Q. And the public assistance AFDC, that information was derived by reference to zip codes, primarily, isn't that correct?

A. Yes.

Q. And the same index was used in determining the low income tax rebate, the medical rebate and the 30 30 rebate?

A. That's right. With an adjustment for what I acknowledge as an estimate.

Q. And the balance is the Office of Indian Affairs an

inter-tribal Indian Ceremonial, which is the Gallup ceremonies?

A. Right.

Q. Did you investigate the State's direct participation in funding the Ramah's School operation at Pine Hill?

A. I don't think there are any State funds. Maybe there are. Are there? The only thing that I know, I didn't ask the public schools to get some of the textbook distribution funds; I didn't inquire.

Q. Parochial school get textbook distribution funds?

[Tr. 305]

A. That's right.

Q. Do you know if the Ramah School ever did?

A. I don't know.

Q. Do you know if the State operates at all in the school busing program?

A. Yes. The State funds that particular bus that we keep talking about.

Q. I am talking about the school bus associated with the Pine School.

A. I doubt it, but I couldn't say for sure.

Q. How about the hot lunch program, are there any State funds applied for hot —

A. I think the federal government provides for the meals on Indian schools.

Q. Are you aware about the State providing any funds for any meal programs?

A. No.

* * * *

[Tr. 306]

* * * *

Q. Could you step to the board for a minute, Mrs. Lindberg.

According to your statistics, the State spends seven hundred fifty-two dollars per pupil.

A. I think when you add up transportation and other costs -

Q. Eight hundred seventy-three dollars?

A. Right.

Q. Are you aware of the number of Ramah Navajo Children who attend the school at Pine Hill?

A. No. I think it is in the hundreds, however,

Q. If I were to tell you, as a hypothetical, that it is four hundred and fifty, would you please multiply eight hundred seventy-three dollars times

[Tr. 307]

four hundred and fifty.

A. Three hundred eighty-two thousand eight hundred and fifty.

Q. The State is thereby saved eight hundred seventy-three dollars per student per year, is that correct, by not having to educate them?

A. Yes, you can make that supposition. It depends on how they would spend it and that sort of thing.

Q. If you are using averages?

A. Sure.

Q. So the State is saving somewhere in the neighborhood of three hundred eighty-two thousand dollars by the efforts of the Ramah Navajo people to obtain their own education institutions, is that fair?

A. Yes.

Q. And if the Ramah Navajo people were also to have programs relating to health clinics and CETA programs, housing programs, that would also be a savings to the State, would it not?

A. Well, not CETA and housing because we probably

wouldn't be providing those services.

Q. But health services would be a savings also?

A. Yes, in part, because mostly, of course, medicaid is mostly federally funded.

Q. Going along in the area of your expertise, do you

[Tr. 308]

have any idea how much tax revenue is generated by having an institution such as Ramah bring into the State some two hundred million dollars a year?

A. We have not tried to analyze that.

Q. Do you have any idea just from that figure?

A. I would not want to make an estimate without a real good examination of it.

Q. I have no further questions.

REDIRECT EXAMINATION

BY MR. RICHARDSON:

Q. Mrs. Lindberg, in computing the indirect expense, you were basing it on services which were available to people, is that right?

A. In large measure. Again, things like Los Lunas would be available to an Indian child, just as any other child. But since there were none, I did not try to impute it.

Q. Things that were actually taken advantage of by specifc Indians, then you tried to put that in a direct benefit category?

A. That's right. If I thought it was a direct benefit type of service.

* * * *

[Tr. 309]

* * * *

BY MR. RICHARDSON:

Q. Do you have any way of knowing if people avail themselves of the direct services?

A. The whole objective of creating an indirect category is to say that those are goods we all con sume whether we want to or not. We are all subject to a court system, whether we want to be or not. It was an attempt — Just by living and breathing and being on this earth, there are certain things that we are participants in. That's the general definition of those indirect services. I suppose you could argue that if you aren't actually propelling yourself down a highway in a vehicle, you don't use the highway, and yet that is how we have our goods delivered and all that sort of thing. So it is intended to be that kind of category where you don't exactly avail yourself deliberately of the services.

Q. Directing your attention to State Road 53 which I believe goes through the Ramah Navajo Reservation,

[Tr. 310]

would you explain how you treated the expenditures on State Road 53 in this report?

A. Well, in that report, I simply indicated that there were expenditures, but I ignored on that little chunk of State Road 53, I ignored it for the purpose of evaluating the benefits. I evaluated the highway benefits on a per capita lot system.

Q. So the specific figures that you came up with on State Road 53 are not in this report as a direct benefit?

A. They are not.

Q. In looking in the area of public school finance and institutions of higher education in New Mexico, do you have any idea whether tuition students pay for all of their higher education?

A. Obviously it does not. Last year we had an

appropriation of a hundred twenty million from our funds to all institutions of higher education which was a hundred and twenty million that students weren't picking up through the tuition and fee.

Q. So somebody going to the University on a scholarship is still receiving benefits beyond just what they are paying for out of their tuition?

[Tr. 311]

A. Yes.

Q. These figures that you give, would you swear on a stack of bibles that it is correct to the very dollar amount?

A. Of course not. They are estimates and they are intended to be just that.

Q. When you are allocating in direct benefits, what was the number of Ramahs that you were estimating this allocation on?

A. I based it on fourteen hundred Ramahs which was -my information was, what was the population in '76. Then I also used '76 state-wide population as a state-wide factor.

Q. And if there were twenty thousand Ramahs, your future would be understated, is that correct?

A. I think so, yes.

Q. I don't have any further questions.

* * * *

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation]

Excerpt From Exhibit P-1 Original Ramah Navajo School Board, Articles of Incorporation And Bylaws.

* * * *

ARTICLE II
Objectives & Purposes

SECTION 1. This corporation is formed for the following objectives and purposes, including charitable, benevolent, social and educational purposes, the general nature of which are as follows:

(a) To secure funding, from either private or public sources, for educational and related services including kindergarten, pre-school, elementary, secondary and adult education to be provided for the Ramah Navajo Community and others in and around the Ramah Navajo Area.

(b) To construct, operate, maintain, and dissolve, if necessary, a school system and such physical structures as may be needed for such school system for the Ramah Navajo Community and others in and around the Ramah Navajo Area including kindergarten, pre-school, elementary, secondary and adult education.

(c) To contract with public or private persons, agencies, corporations or other organizations or individuals for the provision of educational and related services to the Ramah Navajo Community and others in and around the Ramah Navajo Area including kindergarten, pre-school, elementary, secondary and adult education.

* * * *

* * * *

Chapter 3

Membership

§300 Voting Members

Each registered adult member of the Ramah Navajo Chapter of the Navajo Tribe of Indians shall be and hereby is to be considered a voting member of this corporation entitled to vote upon all matters requiring the expression of preferences by the corporation's membership. For purposes of this section an adult shall be any member over the age of twenty-one (21).

§301 Non-voting Members

All other members of the Ramah Navajo Chapter of the Navajo Tribe of Indians shall be and hereby are considered non-voting members.

* * * *

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation]

Excerpt From Exhibit P-l(a) Title 10, Navajo Tribal Code § 51

Chapter 1. School Boards

SUBCHAPTER 1. LOCAL COMMUNITY SCHOOL BOARDS

* * * *

Subchapter 1. Local Community School Boards

§ 51. Establishment.

The Chapters of the Navajo Tribe are authorized to establish such Local Navajo Community School Boards as are suitable for their respective areas.

HISTORY

Source. Tribal Council Res. CAU-87-69, § 1, Title I-A, passed Aug. 8, 1969.

Preamble.

CAU-87-69 contained the following preamble:

"Whereas: (1) The Navajo Tribe is committed to the continuous improvement in the quality of education available to the Navajo People, and

"(2) The Navajo People have demonstrated a willingness and a desire to have greater participation in local school affairs, and

"(3) Local School Boards would improve the quality of education on the Navajo Reservation, and

"(4) In the School Year 1967-68, nine out of ten Navajo Area schools had organized and operated local school boards, and an agency school board organization had been created, and

"(5) The Budget and Finance Committee, by Resolution BFMA-22-69, has given local school boards various duties relating to the Navajo Tribe clothing program for school children, and

"(6) There is a need for uniformity in the procedures of these local school boards, and

"(7) The substance of the proposed act was approved by 36 of 39 agency school boards at a meeting at Hunters Point Boarding School in April of 1969."

Adoption of Navajo Tribal Community School Board Act. CAU-87-69, § 1, adopted the proposed Navajo Tribal Community School Board Act, systematizing procedures for establishment, development, and operation of Navajo Community School Boards.

Navajo Education Policy. CAU-87-69, § 2, adopted as the public policy of the Navajo Tribe the statement of aims and objectives of the Navajo Local Community School Board Program as follows:

"NAVAJO EDUCATIONAL GOALS DEVELOPED
BY THE NAVAJO
TRIBAL EDUCATION COMMITTEE

"1. To seek maximum involvement of parents and Tribal leaders in the education program.

"2. To attack the unique problems of Indian students by the provision of unique programs suited to the needs of these students, such as the ESL Program.

"3. To develop a public information program which reflects progress made on a continuing basis.

"4. To endeavor to assist in any way possible so that full utilization can be made of resources, including the Economic Opportunity Act, Public Law 89-10, and other similar programs which can benefit the Indian people."

Cooperation with local chapters. CAU-87-69, § 3, authorized the Education Committee of the Navajo Tribal Council and the Navajo Area, Division of Education to cooperate with the local Chapters to take any steps necessary to implement Navajo Tribal Community School Board Act and the goals expressed in the statement of the goals of the Navajo Tribal Community School Program."

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation]

Excerpt From Exhibit P-12

Congressional Testimony of Chavez Coho and Bertha Lorenzo seeking Funds for Ramah Navajo School

* * * *

At the Hearings before the Senate and House Interior and Related Agencies Subcommittee on Appropriations

WASHINGTON D.C.

April 11, and April 13, 1972

* * * *

We will begin by telling you very briefly how the school came into existence. The State of New Mexico closed the public high school in Ramah, New Mexico. The Ramah parents filed a suit against the State to try to get them to reopen the public high school. They lost that suit. It caused great consternation amongst the Navajo parents when they learned that this meant that their children would be forced to leave home to attend far away federal and parochial schools. They wanted their children nearby so that they could teach and rear their own children.

The Ramah Navajos then decided to create their own school. They elected five of us to incorporate as a school board, and we were instructed to find a way to start our own school.

* * * *

During the past 104 years, we have not seen a school built in our midst. We could not wait for Washington to fulfil their promise in 1968 . . . so we started educating our own children.

The community of Ramah elected us to start something for their children something which will stop this unending cycle of despair. We want to end it now, for the sake of our children and generations to come. This is why we want to see this school grow. . . . to help bring about the kind of education which will develop strong leaders of our people . . Navajos with a strong sense of pride in their Navajo ways, Navajos who can move confidently in all worlds,

Navajos who will become leaders in all fields of endeavor. This is why we work now to see this school continue. This is why we came this day to ask you to fulfil a promise made by Washington to the Navajo people in the Peace Treaty of 1868.

* * * *

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation]

Excerpt From Exhibit P-21 Public Law 92-369, 86 stat. 508 (Interior Appropriations)

* * * *

CONSTRUCTION

For construction, . . . of . . . buildings . . . and other facilities;

* * * *

Provided further, That not to exceed $1,470,000 shall be for assistance to the Rough Rock School on the Navajo Indian Reservation, Arizona; that not to exceed $950,000 shall be for assistance to the Ramah School on the Navajo Indian Reservation, New Mexico;

* * * *

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation, 89, 90]

Excerpt From Exhibit P-26 Senate Report No. 95-276, 95th Congress, 1st Session (1977) (Interior Appropriations)

* * * *

Funds are included for the following non-budgeted items, with the two school projects to be administered by tribal school authorities:

Design of Hopi High School	$ 175,000
Rough Rock Community High School (library, gym and industrial arts building)	3,519,000
Ramah-Havajo [sic, i.e. Navajo] School (instructional media center)	2,062,000
Northern Cheyenne Tribe (repairs and gym)	200,000
Gila River Indian Community (3 wells)	300,000
Coushatta land acquisition, Louisiana	100,000
Barrow gas pipeline design, Alaska	600,000

* * * *

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by Stipulation]

Excerpt From Exhibit P-29 Contract Between School Board and BIA for Construction (Phase I-4-3-74)

No. 1420-0150 Effective Date 4/3/74

Project No. LM75-188

Issued By: Bureau of Indian Affairs
Division of Facilities Engineering
P.O. Box 1248
Albuquerque, New Mexico 87103

Contractor: Ramah Navajo School Board, Inc.
P.O. Box 248
Ramah, New Mexico 87321

This procurement was negotiated pursuant to 41 U.S.C. 252 (x 10) and P.L. 93-120, October 4, 1973 and P.L. 93-245, January 3, 1974

Supplies/services:

Financial assistance to the Ramah Navajo School Board for the construction of school facilities Department of the Interior and Related Agencies Appropriation Act, 1974 (Public Law 93-120), October 4, 1973, Title I, Bureau of Indian Affairs, Construction and Supplemental Appropriations Act. 1974 (Public Law 93-245), January 3, 1974, Chapter IV, Department of the Interior, Bureau of Indian Affairs, Construction.

General Provision - March 1974

* * * *

Name of Contractor: Ramah Navajo School Board, Inc.

(Signatures omitted in printing) **Date Signed April 22, 1974**

* * * *

Paragraph 8(a)(6): The provisions of this paragraph (a), including this subparagraph (6), shall be applicable to and included in each subcontract hereunder which is on a cost, cost-plus-a-fixed-fee, time-and-material or labor-hour basis.

(b) The Contractor further agrees to include in each of his subcontracts hereunder, other than those set forth in subparagraph (a)(6) above, a provision to the effect that the subcontractor agrees that the Comptroller General, the Secretary of the Interior, and the Contracting Officer, or any of their duly authorized representives, shall, until the expiration of 3 years after final payment under the subcontract, or of the time periods for the particular records specified in Part 1-20 of the Federal procurement regulation (41-CFR 1-120), whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontractor. The term 'subcontract', as used in theis paragraph (b) only, excludes (i) purchase orders not exceeding $2,500, and (ii) subcontracts or purchases orders for public utility services at rates established for uniform applicability to the general public.

Paragraph 9: *Inclusion of Provisions in Subcontracts:* The Contractor agrees to incorporate paragraphs 1, 2, and 4 through 9 and subparagraphs (a) through (g) of paragraph

3 of these General Provisions in each and every subcontract entered into, for the purpose of complying with the provisions of this contract and to require each subcontractor to include these paragraphs in each of their subcontracts.

Paragrapah 10: *Furnishing Documents:* The Contractor agrees to funish the Government copies of contracts entered into for architecural and engineering services, construction, equipment, or other purposes related to performance of the provisions of this contract, for the purpose of determining compliance with its terms.

Paragraph 11: *Title to Facilities.* The title to the new school facilities constructed, purchased or otherwise acquired, including equipment, and paid for with funds provided under this contract, shall vest in the Contractor.

Paragraph 13: *Bonds.* The Contractor shall require that any subcontractor for construction of any part of the school facilities be supported by performance and payment bonds, substantially in the form required by the American Institute of Architects, each in the amount of 100% of the contract, under which the Contractor and the United States will be named as beneficiaries.

Paragraph 14: *Subcontracts.* The Contractor may utilze any type of contract form, general conditions, etc., that is suitable for the subcontracts it enters into so long as the requirements of this contract with respect to the inclusion of certain material therein and the other terms of this contract are satisfied.

Paragraph 15: *Payment Provisions.* The Government agrees

to make payment in advance and the Ramah Navajo School Board agrees to accept as full consideration for carrying out the provisions of this contract, payment in the sum of $2,700,000, said payment to be made upon execution of this contract.

Paragraph 16: *Use of Funds.* (a) Funds available under this contract are to be used for assistance to the Contractor in carrying out the purposes described in The Department of the Interior and Related Agencies Appropriation Act, 1974 (Public Law 93-120), Title I, Bureau of Indian Affairs, Construction, and in Supplemental Appropriation Act, 1974 (Public Law 93-245), Chapter IV, Department of the Interior, Bureau of Indian Affairs, Construction. Funds not needed for the purpose contemplated in the Act shall revert to the Government.

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. 78-438(C)
[Tr. 184]
Excerpt from Exhibit P-43 Findings of Fact and Conclusions of Law, District Court of McKinely County, New Mexico, *Ben Jose, et. al. v. Gallup-Mckinley County School Board, et. al.*

IN THE DISTRICT COURT OF McKINLEY COUNTY, STATE OF NEW MEXICO

BEN JOSE, et al,
Plaintiffs
-vs-
No. 12913
GALLUP-McKINLEY COUNTY SCHOOL BOARD, et al,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried to the Court without a jury, the Court for its decision makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Of the several named plaintiffs, Juan Martine and Jimmie T. Pinto are: (a) The parents of school age children; (b) they are Navajo Indians; (c) they reside in the Namah [sic] Navajo area; (d) their homes are more than one and a half miles from present McKinley County school bus routes;

(e) their children are residing away from home and attending schools other than as day students in the McKinley County public schools; (f) they desire that their children be transported by public school transportation to attend McKinley County public schools as day students so that they can reside at home while being educated. These facts and circumstances are commonly shared by many other persons.

2. The plaintiffs Jerry, Stanley and Wilma Clara Martine are minor children of the plaintiff Juan Martine. The plaintiffs Della, Stewart, Nettie, Jeanette, Genevieve, Laberta and Austin Pino are the minor children of the plaintiff Jimmie T. Pino. (a) Their ages range from eight to eighteen and all are of school age; (b) all of these children wish to live at home and attend McKinley County public schools and be transported by public school transportation to and from the schools; (c) present school bus routing does not afford these children transportation from their homes to school; (d) they are variously obtaining their education under B.I.A. auspices; (e) they are residing away from home during the periods of school attendance. These facts and circumstances are commonly shared by many other children in the Ramah Navajo area.

3. The Ramah Navajo area, as referred to in this action, includes generally the portion of Valencia County west of the Continental Divide, but specifically Townships 7, 8, 9 and 10 N. R. 16 W. NMPM, and Townships 7, 8, 9 and 10 N. R. 15 W. NMPM, and Townships 8 and 9 of R. 14 W. NMPM, and is within the geographical area of the Grants Municipal School District.

4. The Gallup-McKinley County School Board and its predecessor for twenty years has afforded education in

the Ramah and Zuni schools and bus transportation to the schools for the children of the Ramah Navajo area, and the Grants Municipal School District Board and its predecessor have not afforded them education or transportation for twenty years, excepting a small number from Townships 7 and 8 N. R. 15 and 16 W. NMPM, who are bussed to Fence Lake Elementary School.

5. The Gallup-McKinley County School Board has adopted a policy as to what children in the Ramah Navajo area will be afforded transportation to and education in its schools, this being extended to all those residing within one and a half miles of the established school bus routes and to those who live beyond who can manage to get to the bus routes. This policy has been the basis of an understanding between the Gallup-McKinley County Board and the Bureau of Indian Affairs, with the latter agency providing for the education of the children of families who reside beyond the one and a half mile distance from the bus routes and who do not manage to get their children to the bus route. The B.I.A.'s manner of providing for such children is to place them away from home in dormitories with the children then attending public schools as day students, or to place them as boarding school residents in B.I.A. operated schools.

6. It is physically feasible for school bus routes to be extended and transportation to public schools of McKinley County afforded to the plaintiff children and others similarly situated.

From the foregoing facts the Court as a matter of law concludes:

1. The several plaintiffs as set forth in Findings 1 and 2 have a right to be enforced in common with other persons so numerous as to make it impracticable to bring them

before the Court and may maintain this action pursuant to Rule 23 of the Rules of Civil Procedure.

2. The Gallup-McKinley County School Board is the agency of state government having the responsibility for the education of the plaintiff school children, by virtue of its having extended its area of responsibility beyond its legal area of jurisdiction to include the people of the Ramah Navajo area for many years, and it is now estopped from discontinuing such service.

3. The failure of the Gallup-McKinley County School Board to act to cause the State Transportation Division to afford the plaintiff children transportation and thus a public school education while living at home is arbitrary and discriminatory.

4. The lack of transportation effectively deprives the plaintiff children of the right to a free public school education to which they are entitled under Article XII, Section 1 of the State Constitution, and is also discriminatory so as to deny them the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

5. The Gallup-McKinley County School Board should be enjoined affirmatively to act to cause the extension of routes and means for transportation from their homes to the public schools of McKinley County of plaintiff children and others similar situated, with such action to be taken within a reasonably short time.

Contrary requested findings and conclusions are refused.

/s/ J. FRANK ZINN
District Judge

(Jurat omitted in printing)

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 192]

Excerpt From Exhibit P-46 Ramah Navajo Chapter Resoulution No. M75-70-1A, February 6, 1970 establishing Ramah Navajo School Board.

* * * *

We, the Ramah Navajo Community Chapter Officers, consisting of a President, Vice-President, Secretary and our Chapter Delegate to the Navajo Tribal Council, are authorized to act for the Ramah Navajo Community Chapter; and

WHEREAS, the Ramah Navajo Chapter, a political subdivision of the Navajo Tribe has recognized for many years the need for a local school;

WHEREAS, the Ramah Navajo Chapter has been forced to send Navajo students to distant boarding schools;

WHEREAS, the Ramah Navajo Chapter is unsatified [sic] with educational systems of public schools and BIA boarding schools;

WHEREAS, the parents of the students living within the Ramah Navajo Chapter jurisdiction would like a voice in the education of their children;

NOW, THEREFORE, BE IT RESOLVED, that the Ramah Navajo Chapter forms a school board know [sic] as the Ramah Navajo School Board who will establish a school for the Ramah Navajo community.

BE IT FURTHER RESOLVED, that the Council Delegate and the Navajo Community Chapter Officers are authorized to sign the resolution and to take whatever steps are necessary to reach its goals.

(Signatures and Certification
Omitted in Printing)

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 311,312]

Defendant's Exhibit D-A: Letter of 3-11-74 from Michael P. Gross to Robert A. Dudley concerning Ramah Navajo school construction contract

March 11, 1974

Mr. Robert A. Dudley
Chief,
Facilities Engineering
Bureau of Indian Affairs
Federal Office Bldg. and U.S. Courthouse
P. O. Box 1248
Albuquerque, New Mexico 87103

Re: Ramah Navajo School Project No. LM75-188 W56-169/3040

Contract No. 14-20-0150-1113

Dear Mr. Dudley:

I just wish to thank you and your staff for meeting with us last Friday, March 8, to discuss the contract between Ramah and the Government which is needed for delivery of appropriated construction funds to Ramah.

As I understand it your staff will draft the contract form

and submit it to the Ramah Navajo School Board for approval by late March. If I may, I would like to repeat the understandings about this contract and the school facility which we reached with you:

1. Since Congress appropriated no money for the purpose to the BIA, the bidding phase must be paid for by Ramah from the $2.7 million granted to it. (We assume that if any funds are left over from the Planning and Design contract, above, Ramah may use them to pay for the bidding phase.)

2. During the construction phase the BIA will assist Ramah upon request and upon reasonable reimbursement with techical [sic] resources, e.g., assistance in construction supervision.

3. The Ramah Navajo School Board, Inc. will own the new facility.

4. Although the Federal Government will have no direct interest in the new construction as owner, it will be third party beneficiary to the construction contract between Ramah and the builder. (This is a direct result of the Federal trust reponsibility for the education of Ramah Indian children and the responsibilities conferred through several statutes, e.g., 25 U.S.C. 13.)

5. Upon completion of Contract No. 14-20-0150-1113 by Ramah the Government will certify in writing that the contract has been satisfactorily completed.

We also discussed with you the percentage in square feet of the Program of Requirements for this project which you believed can be constructed with the limited budget of $2.7

million. At this time I would like to ask you to furnish us a written estimate as to this percentage.

Again, let me thank you for your cooperation. I look forward to talking with you again. If you have any questions please let me know.

(Signature omitted in printing)

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 186]

Defendant's Exhibit D-C: New Mexico Department of Education Memorandum and Gallup-McKinley School District reports on Ramah Navajo Reservation school transportation issues (1969)

(SEAL)

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION – EDUCATION BUILDING
SANTA FE - 87503

LEONARD J. DE LAYO SUPERINTENDENT OF PUBLIC INSTRUCTION

CERTIFICATE

I hereby certify that I am the State Transportation Director for the New Mexico State Department of Education; that I am the official custodian of records for the Department of Education's School Transportation Division and that the attached "Report on Special School Bus Transportation Survey Made in the Ramah Navajo Area" dated April 9, 1969, the memorandum to State Board of Education members from C.B. Lemon dated September 9, 1969, and the map of the Ramah Navajo Area are true and correct copies of documents prepared and preserved in the files of the School Transportation Division by employees of that Division as a part of their official duties.

(Signature and jurat omitted in printing)

(S E A L)

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION
CAPITOL BUILDING
SANTA FE
87501

LEONARD J. DE LAYO
SUPERINTENDENT OF PUBLIC INSTRUCTION

M E M O R A N D U M

To; State Board Members

From: C. B. Lemon, Director of Transportation and Coordinator of Administrative Services

Date: September 9, 1969

Enclosed is a copy of a transportation protest by the Gallup-McKinely County Board of Education, and some background material which I have prepared for your information. Copies of the enclosed letter also can be found in your State Board of Education books for the October 2 and 3 board meeting.

P R O T E S T

To The New Mexico State Board of Education:

The Gallup-McKinley County Board of Education

herewith protests the decision of the State Transportation Division of the Department of Education of the State of New Mexico with respect to the application of the Gallup-McKinley County Board of Education on extension of school bus routes and transportation in the Ramah-Navajo Area of McKinley and Valencia Counties, New Mexico, which requests were made purusant to the decree of the District Court of McKinely County, New Mexico, in Cause No. 12,973, [sic] entitled: "Ben Jose, et al., Plaintiffs, vs. Gallup-McKinley School Board, et al., Defendants", as supplemented by letter from the Superintendent of the local Board on June 11, 1969.

The decision of the State Transportation Division is protested on the ground that it is based upon an erroneous conception of certain facts, a misinterpretation of certain established standards for establishment of school bus routes and for the further reason that the refusal to allow additional transportation was based upon cost factors which would violate constitutional rights.

Dated this /25th/ day of August, 1969.

Gallup-McKinley County
Board of
Education

By /s/

Superintendent

(S E A L)

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION
CAPITOL BUILDING
SANTA FE
87501

* * * *

To: State Board of Education Members

From: C. B. Lemon, Director of Transportation and Coordinator
of Administrative Services

Date: September 9, 1969

Subject: Gallup-McKinley County Transportation Protest

On October 17, 1968, I received a letter from Mr. Alex Krivokapich, Director of Special Services for the Gallup-McKinley County Schools, advising me of the action of the District Court in ordering a study, by the Gallup-McKinley Schools, of the school bus routes in the Ramah Navajo area of western Valencia County. Neither the State Board of Education nor the Transportation Division were made a party to this litigation. We received a copy of the court order on March 26, 1969, directing the Gallup-McKinley County Schools to cause the extension of routes and means of transportation in the Ramah Navajo area of Valencia County.

On April 9, 1969, Mr. J. L. Warren of this division, con-

ducted a comprehensive transportation survey of the area. He was accompanied by administrative personnel from both the Gallup and Grants Schools, by an attorney for the DNA, and by Mr. Willard Scott, Director of Indian Education, State Department of Education. In general, the roads were found to be unimproved and precluded the practicability of extending school bus service. All interested parties were so informed.

A letter dated June 11, 1969 from Dr. W. B. FitzSimmons, Gallup Superintendent, was received on June 12, 1969. This letter proposed several extensions of school bus service requiring a number of four-wheel drive feeder vehicles. Mr. Warren analyzed the proposals, and, as there were some questions unanswered, on July 15, 1969, I requested Dr. FitzSimmons to furnish further information. This he did on July 19, 1969.

Consistent with statewide procedures, I denied the four-wheel drive feeders and approved extensions only as recommended in Mr. Warren's survey.

On September 2, 1969, Mr. De Layo received a formal protest of my denial to the State Board of Education. The protest is made consistent with Section 77-4-5.

In a letter dated August 15, 1969, Mr. M. B. McBride, Superintendent of the Grants Municipal Schools, advised me of the action of the Grants Board of Education in assuming the responsibility of educating all the children residing in this area of Valencia County. They have opened an elementary school at the Ramah Chapter House and are transporting the junior and senior high school pupils into Grants.

It appears to me that inasmuch as the Gallup-McKinley County Schools no longer have any responsibility for the education or transportation of the pupils residing in the Ramah Navajo area of Valencia County their protest is no longer a valid one.

Report on Special School Bus Transportation Survey Made in the Ramah Navajo area located southeast of Ramah and includes a small amount of territory in McKinley County and a much more extensive area in Valencia County

Date of Survey: April 9, 1969

Survey Participants: *W. B. FitzSimmons,* Superintendent of the Gallup-McKinley County School System; *Alex Krivokapich,* Director of Special Services for the Gallup-McKinley County School System; *Leslie Clawson,* Principal of the Ramah Elementary School which serves students in grades one through eight—students above this grade level, that is 9-12 are transported to the Zuni High School approximately twenty-four miles west of Ramah; *Bailey Henio,* Custodian at the Ramah Elementary School—this person served as the principal source of information with respect to identity of families as well as location and numbers and grade level of pupils for the different families. Also, his ability to speak the Indian language was very helpful during the survey. *Onesimo Garcia,* Director of Special Services for the Grants Municipal School System; *Michael Gross,* Attorney for the Law Offices of DNA (Dirnebeiina Nahilna Be Agaditahe) at Window Rock, Arizona; *Willard A. Scott,* Director of Indian Education for the New Mexico State Department of Education in Santa Fe, New Mexico; and, *James L. Warren,* Transportation Specialist for the School

Transportation Division of the State Department of Education in Santa Fe, New Mexico.

Purpose of Survey: To comply with Court Order No. 12913 issued by the District Court of McKinley County, State of New Mexico which states in part as follows:

Decree

The Court, having entered in its decision in this case by its findings and conclusions, to implement that decision does decree:

1. The Defendants (Gallup-McKinley County School Board, et al) are directed and affirmatively enjoined to act to cause the State Transportation Division of the Department of Education to approve and allow you to provide free public school transportation to the plaintiff children and other children similarly situated so as to afford them a public school education in the schools of McKinley County while permitting them to live at home.

2. The defendants are further directed to report to the court what steps have been taken by them to carry out the terms of this decree by May 1, 1969.

3. The Court retains jurisdiction of this cause until further order.

Procedure: The School Transportation Division of the State Department of Education submits this report to the Superintendent of the Gallup-McKinley County School System, who according to the court decree is responsible for reporting directly to the court by May 1, 1969. Other members of the survey team requested copies

of this report and are being provided with same. It should be clearly understood that the content of this report represents the interpretations and thinking of the State School Transportation Division and are based on information secured from the field survey, and guidelines previously established by that division, and may not necessarily reflect the opinions of other survey participants.

Findings and Recommendations: buses under jurisdiction of the Gallup-McKinley County School System serve the area under consideration and both routes were checked to clearly establish current operating procedures and circumstances. The two buses travel indentical [sic] routes, however, one transports high school pupils (grades 9-12) to the Zuni High School located approximately twenty-four miles west of Ramah on State Highway -53, and the other bus transports elementary pupils (grades 1-8) to the Ramah Elementary School. The time schedules for the two buses are quite different with the high school bus starting much earlier (about 6:50 a.m.) in the morning in order to arrive in Ramah about 7:50 and Zuni before classes begin at 8:30 a.m. The following is a chart description of the two routes:

(Bus chart omitted in printing)

Regular bus service is available to the Ramah Chapter House; however, a number of families are scattered throughout an area southeast of the Chapter House which is not provided with regular service to public schools at present. An effort was made to investigate this area thoroughly with respect to distances, road conditions, number of families as well as their locations and approximate number of pupils involved. Starting seven tenths of a mile northeast of the Ramah Chapter House, the survey team traveled 47.8

miles generally in the form of a southeastern loop and spent two hours and thirty-four minutes securing as much pertinent information as possible. Some twenty-four families were identified by Bailey Henio and Leslie Clawson, and it is estimated that 75-80 students of all grade levels would be involved. Many families do not live along the main road, but are located up to two or three miles off the road, which appears to eliminate any practical consideration for providing service directly to such residences. Major considerations in determining feasibility of providing additional bus service in this area as well as others may be identified as follows:

1. Road types and conditions.

2. Number of pupils located in patterns that make it possible to establish logical routing.

3. Travel times and distances involved in getting pupils to proper attendance centers.

4. Weather severity and availability of adequate road maintenance equipment.

5. Type and amount of equipment required to perform the service which also relates to cost.

The factors cited above generally are unsatisfactory and unfavorable to such an extent that it is not considered feasible to provide additional bus service except to the following areas or locations.

1. The road northeast of the Ramah Chapter House for a distance of about seven miles is considered to be reasonably suitable for daily school bus operation, except when rain and snow are heavy. At present there are no families who

could be served in this area; however, if families do begin to occupy this area, arrangements should be made to provide regular service.

2. The road southwest of the Ramah Chapter House for about four miles is quite suitable for bus service, but again no families occupy this area at present. Service should be extended into this area when needed.

3. An area five miles southeast of Ramah along highway -53 and 2.3 miles northeast of the highway should be provided with regular service for elementary students immediately or at the beginning of the 1969-70 school year depending on existing bus capacity. According to survey information, there are about 12 elementary pupils among the following families: Beaver, (two Jim families), Garcia, and Frank. High school bus service is not recommended at present for this location because of the long distance (53.8 miles, one way) now being traveled by the high school bus.

4. An area south of Ramah involving the following families: John White (4 pupils), Isabel Jose (3 pupils), Bessie Martine (4 pupils), and Billy Begay (5 pupils), was checked for possible regular service but roads are considered to be inadequate at present.

Summary:

The intent is to show that where conditions and circumstances permit, State Transportation officials are vitally interested in helping local school officials provide regular daily transportation service to all pupils under their jurisdiction. This position is positively reflected in recommendations 1, 2, and 3 of this report.

Locally, indications are that roads will continue to be im-

proved, as they obviously have been for the past several years, which will in turn make it possible to provide additional services. Roads throughout the area can readily be classified as follows:

1. Graded dirt where road beds are built up properly and adequate drainage is provided.

2. Graded dirt without proper road beds and drainage.

3. Dirt trails with no evidence of any maintenance whatsoever, hopefully, gravel or surfacing material could be placed on some of the improved dirt roads in the future, which would tend to make the roads "all-weather," which they are not at present. Another hindrance to daily operation of motor vehicles is the fact that road improvement is somewhat "spotty" or non-continuous. For instance, a good section of roadway may lead immediately into a very bad section of road. Better planning could eliminate many of these unsatisfactory situations.

The court's findings of fact and conclusions of law identify Juan Martinez as one of the plaintiffs. Interestingly enough to all survey participants, and given an explanation of survey purposes; he immediately shook his head in a negative manner and stated that school buses could not operate on a daily basis until roads were improved. He also commented further on bad winter time conditions.

Southwest of the area concerned in this survey, is a large block of territory that is commonly considered to be related to Fence Lake and, in fact, is currently being served by buses transporting pupils to Fence Lake; however, it is also necessary that high school students be

transported from Fence Lake to Zuni. The territories are very similar, but recent road improvement has made it possible to extend and add additional bus service in the Fence Lake area. It seems reasonable to assume that the same thing can and will occur in the Ramah Navajo area. No doubt, availability of funds will determine how fast the improvements are made.

IN THE DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT

No. CV-78-438

[Tr. 36-38, by stipulation]

Excerpts from Defendant's Exhibit 3 to Motion for Summary Judgement: Bid specifications for phase I Ramah-Lembke school construction contract

* * * *

INVITATION FOR BIDS

You are invited to submit a sealed proposal under a lump sum contract for the construction of the Ramah Navajo School Facility. Bids will be received at the office of Kruger, Lake & Associates by Mr. Chavez Coho, Chairman, Ramah Navajo School Board, Inc., Ramah, New Mexico until 3:00 P.M. (Local Time), Tuesday, July 30, 1974, and then opened and publicly read aloud. Any bid received after closing time will be returned unopened.

Drawings and specifications may be obtained by General, Mechanical and Electrical Contractors upon deposit of $100 for each set from Hirsen, Gammill, Trumbo and Cook,

Architects, 2150 Dwight Way, Berkeley, California 94704, or Kruger, Lake and Associates, Architects and Engineers, Suite 105, 601 San Pedro Dr., NE, Albuquerque, New Mexico 87108. Three (3) sets of plans and specifications will be issued to general contractors. The mechanical and electrical contractors will be issued one (1) set. Additional sets may be had for the cost of printing. All drawings and specifications shall be returned to the above address after bids have been opened, within ten (10) days, in good condition.

A guarantee of five percent (5%) of the amount of the bid will be required with each bid in the form of a bid bond or certified check.

A performance bond and a labor and material payment bond will be required in the amount of one hundre [sic] percent (100%) of the amount of the contract price. The contractor will deliver this bond simultaneously with his delivery of the executed contract.

Bids must be submitted upon the Bid Form furnished with the specifications, and the successful bidder will be required to execute a STandard A.I.A. Form of Agreement Between Owner and Contractor.

The right is reserved, as the interest of the Owner may require, to reject any and all bids, to waive any formality in bids received, and to accept or reject any items of any bid, unless such bid is qualified by specific limitation. The contractor shall hold all bids firm for thirty (30) calendar days after the bids have been opened.

(Signature omitted in printing)

GENERAL REQUIREMENTS

1A - AIA GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

The 1970 Edition of the General Conditions of the Contract for Construction are a part of these specifications to the same extent as if written out in full. Copies of the 1970 Edition of the AIA General Conditions of the Contract for Construction may be obtained from the Office of the Architect-Engineer upon request. Each copy of the contract will contain a copy of the 1970 Edition of the AIA General Conditions of the Contract for Construction.

1B - GUARANTEE

The general contractor shall and hereby does warrant and guarantee all workmanship and materials for a period of one year from date of completion as evidenced by date of Architect-Engineer's final certificate for payment of this contract. All guarantees for a longer period of time required by the work sections of these specifications shall be secured by the general contractor for the sub-contractors and delivered to the Architect-Engineer and are hereby warranted by the general contractor as much as if countersigned by him.

1C - SCOPE OF WORK

The contractor performing this work shall furnish all labor, equipment, tools and materials and pay for all special taxes or permits necessary to complete all work as hereinafter required or as shown or called for on the drawings. He shall provide all the necessary barricades and safety features to protect traffic.

1D - SUPPLEMENT TO GENERAL CONDITIONS, ARTICLE 11, INSURANCE:

The contractor shall procure and maintain during the life of the contract all insurance required under the General Conditions and this heading. In addition to insurance provisions under General Conditions, amendments as set forth below shall also apply:

1. Contractor's Liability Insurance:

a. This insurance shall be written for not less than the following limits of liability:

Bodily Injury	-One Person	$100,000
	-Each Accident or Occurrence	$300,000
Property Damage	-Each Accident	$ 50,000
	Aggregate	$ 50,000

b. All liability insurance required herein shall be under Comprehensive Ceneral and Automobile Bodily Injury and Property Damage form of policy.

Legislature approved December 16, 1936, known as "The New Mexico Unemployment Compensation Law," with all amendments to date, and requirements of his subcontractors to comply with same. All contractors shall comply with all other laws and regulations pertaining to labor and mechanics enacted by Congress of the United States, and the State of New Mexico.

1Y - STATE OF NEW MEXICO SALES AND USE TAX LAW

All contractors on project shall comply with provisions of State of New Mexico Sales and Use Tax Law and all amendments to same and require all of their subcontractors to do likewise.

1Z - OWNER'S FINANCIAL PROVISIONS

The Owner is The Ramah Navajo School Board, Inc., Post Office Box 248, Ramah, New Mexico 87321, a Corporation of New Mexico, and Mr. Chavez P. Coho is the President of the Corporation. This Corporation has a Federal Grant to design the entire school facility and another grant to construct Phase One of this facility.

The General Provisions of the Owner's Financial Assistance are duplicated herein and are hereby made a part of the bidding and contract documents.

Trustee for the construction funds granted to the Owner for this project is the Albuquerque National Bank, which is empowered by the Owner to institute, join in, maintain, defend, compromise, submit to arbitration, or settle any litigation, claim, obligation or controversy with respect to, or in relation to, any matter affecting the Trust Estate, regardless of the manner in which such matters have arisen, all in the name of the Trustee. The Trustee is further empowered by the Owner to make all the payments to the contractor on the project on the basis of the contractor's sworn statements verified by the Architect and approved by the President or Vice-President and Executive Director of the

Owner, any provision of the 1970 Edition of the General Conditions of the Contract for Construction of the AIA notwithstanding.

1AA - WAGE DETERMINATION

The wage rates set forth are the minimum rates which may be paid to the classifications of laborers and mechanics designated therein pursuant to the Davis-Bacon Act (Act of March 3, 1931, as amended; 40 USC 276a and following). The Commission does not represent that said minimum rates do now, nor that they will at any time in the future, prevail in the locality of the work for such laborers or mechanics; nor that such mechanics or laborers are or will be obtainable at said rates for work under this contract; nor that said rates represent the most recent wage determination by the Secretary of Labor with respect to such classifications of laborers or mechanics in the locality of the work. The wage determination decisions and modifications bound at the end of this section shall apply to this project.

1BB - PREFERENCE FOR QUALIFIED LOCAL LABOR

In view of the depressed economy of the Ramah Navajo area, preference for employment for all work under the contract shall be given qualified local labor.

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No. 80-2162

IN THE

Supreme Court of the United States

October Term, 1980

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee.

On Appeal From The Court of Appeals of New Mexico

MOTION TO DISMISS OR AFFIRM

Jeff Bingaman
Attorney General of New Mexico

JAN UNNA
Special Assistant Attorney General
Rothstein, Bailey & Unna
136 Grant Avenue
Santa Fe, New Mexico 87501
(505) 988-8004

Gerald B. Richardson
Assistant Attorney General
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

Attorneys for Appellee

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

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On Appeal From The Court of Appeals of New Mexico

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Court of Appeals of New Mexico on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

The appeal concerns a state's power to tax a non-Indian contractor's receipts from constructing school buildings for a school board. The tax is New Mexico's gross receipts tax,

§§7-9-1 *et seq.*, NMSA 1978, the same one involved in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and more recently in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991, *cert. den.* ____ U.S. ____, 49 L.W. 3619 (No. 80-812, February 23, 1981).

The taxpayer in this case is Lembke Construction Co., Inc., a non-Indian general construction contractor. It is a New Mexico corporation headquartered in Albuquerque, and it is licensed by New Mexico as a general building contractor. Tr. Proc. 128-129, 104; Jur. St. 45. Although the buildings Lembke constructed for the School Board are on Reservation land, Lembke constructs buildings on non-Indian lands throughout New Mexico; all the paperwork on the construction involved in this appeal, such as contracts, change orders, estimates, bids, and subcontracts, was the same used by Lembke for all its non-Indian projects. Tr. Proc. 144. Lembke's construction bids included New Mexico gross receipts tax as a cost of the project, as did the bid of Lembke's competitor. Jur. St. 47.

The state is not taxing education. Jur. St. 52. All of Lembke's taxable gross receipts were derived from constructing buildings under construction contracts between the School Board, as owner, and Lembke, as contractor. Jur. St. 47. Those contracts were for construction in phases of a number of school buildings on the Ramah Navajo Reservation in New Mexico. The School Board understood from the outset that the cost of the construction project included New Mexico gross receipts tax, Tr. Proc. 103, and Lembke and its competitor both included gross receipts tax as part of the total construction cost bid. Jur. St. 47. The construction contracts between the School Board and Lembke providing for the gross receipts tax as a cost of construction were approved by the BIA. Jur. St. 16.

During construction Lembke issued New Mexico nontaxable transaction certificates to subcontractors and material suppliers,

Jur. St. 48, the effect of which was to prevent pyramiding of the gross receipts tax by exempting the subcontractors and material suppliers from the gross receipts tax. §§7-9-51 and 7-9-52 NMSA 1978. Their use presupposes that the gross receipts tax will be paid on the general contractor's total gross receipts. *Ibid.* Lembke regularly paid the gross receipts tax to the state since 1974 when the construction project began and passed the economic burden of the tax on to the School Board[1] as part of the periodic construction draw procedure, in accordance with the construction contracts providing for the contractor to "pay all sales, consumer, use and other similar taxes required by law" and "to comply with sales and use tax laws." Jur. St. 47. There was no particular building or facility that could not be built because of the gross receipts tax. Tr. Proc. 125.

The School Board is a New Mexico corporation, Tr. Rec. I, 1. It was incorporated for the sole purpose of obtaining federal funds for the construction of its school buildings. Tr. Proc. 117. All monies used by the School Board to pay for Lembke's construction work came from direct Congressional appropriations aggregating in excess of $9 million.[2] No tribal funds were used to build the school facilities. Tr. Proc. 104; Jur. St. 46. The affairs of the School Board are controlled solely by enrolled members of the Navajo Tribe, Jur. St. 45, but the School Board in fact exercises a good measure of independence from the Tribe. Tr. Proc. 50, 71-72, 187, 248. The School Board is not a

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[1] The legal incidence of New Mexico's gross receipts tax is on the seller, Lembke, even though its economic burden may be passed on to the buyer, the School Board. *United States v. State of New Mexico,* 581 F.2d 803 (10 Cir. 1978).

[2] P.L. 92-369 (86 Stat. 508), P.L. 93-245 (87 Stat. 1071), P.L.,93-404 (88 Stat. 803), P.L. 94-165 (89 Stat. 977), 95-74 (91 Stat. 285), and P.L. 97-74, Jur. St. 46.

part of or equivalent to the governing body of the Navajo Tribe. Jur. St. 45.

Three years after construction began, Lembke, at the request of the School Board, filed a claim for refund with the state claiming that all gross receipts taxes for its construction receipts should be refunded. Tr. Rec. I, 3. The claim was denied, and Lembke and the Board filed a refund action in the New Mexico District Court. The Court denied their claim for refund, which denial was affirmed by the New Mexico Court of Appeals, ____ N.M. ____, 625 P.2d 1225 (Ct.App. 1980), *cert. den.* ____ N.M. ____, 627 P.2d 412 (S.Ct. 1981).

THIS APPEAL DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS AND SHOULD ACCORDINGLY BE DISMISSED.

1. Taxation of Lembke's Receipts From Construction of Buildings on a Reservation Is Not Preempted by Federal Law.

The School Board and Lembke argue, based on the *White Mountain*[3] case, that the state's tax is preempted by federal law. This doctrine, however, has no application to Lembke's activity, given the facts of this appeal.

White Mountain holds that state taxes on a non-Indian's receipts from logging work on the White Mountain Apache Reservation were preempted because

> ". . . the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed

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[3] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980).

> regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs."
>
> 100 S.Ct. at 2584.

Justice Marshall expands this point, discussing in detail federal statutes, regulations and supervisory control exerted over the logger's daily activities.

The contrast between the detailed regulation of the taxed activity (logging) in *White Mountain* and the glaring lack of federal regulatory control of the taxed activity (construction of buildings) in this appeal, strikingly demonstrates the want of substance of this appeal. There was no federal regulatory scheme, comprehensive or otherwise, that governed Lembke's building construction activities. There were no Acts of Congress applying specifically to construction of the kind that Lembke did, no regulations of the Secretary of the Interior guiding its daily affairs, and there was no day-to-day supervision of its construction by the BIA. By the School Board's own admission the BIA exercised no substantive control over construction,[4] and in fact the BIA even opposed the School Board's plans for operating its own schools. Tr. Proc. 71. The lack of federal interest is dispositive, for "in the specific context" of this appeal "the exercise of state authority would [*not*] violate federal law." *White Mountain,* 100 S.Ct. at 2584.

Moreover, the statutes or regulations cited without explanation or analysis by Lembke and the School Board do not support their notion of preemption in this case. None of the monies made available to the School Board for construction were granted, disbursed or obtained under any of these statutes. These provisions had no direct application to Lembke's construction work for the School Board. The preemption argument

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[4] Tr. Proc. 62, 83-85, 109, 111-112, 116, 119-120.

lacks any significant support in the facts and record of *this* appeal.

The record demonstrates that New Mexico does have an interest in taxing the non-Indian activity at issue and how this interest overshadows whatever slight federal interest there may be. *White Mountain* concerned a non-Indian contractor who operated solely on the reservation and received little or no benefits from the state imposing the tax in question. Lembke, by contrast, is headquartered in Albuquerque and does business in this state with non-Indian entities. It derives substantial benefits from the State of New Mexico and receives the full panoply of state services and benefits available to citizens of New Mexico. *Commonwealth Edison Co. v. Montana*, ___ U.S. ___, 49 L.W. 4957 (No. 80-581, July 2, 1981). In addition New Mexico's direct and indirect expenditures on behalf of the Ramah Navajos in 1979, for example, were $390,000. Tr. Proc. 280. The state thus has a substantial interest in levying its non-discriminatory gross receipts tax. *White Mountain*, 100 S.Ct. at 2587; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 2085 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940). The "particularized inquiry" called for by *White Mountain*, 100 S.Ct. at 2584, shows that in this instance New Mexico's tax does not violate federal law.

The weakness of the preemption contention in this case is obvious from the School Board's attempt to change the regulated subject from construction to education. Jur. St. 21. The School Board would have the focus be on the use to which the buildings are put, not on the taxed activity of construction. Its theory applied to the facts of *White Mountain* would disregard the logger's taxable activity and zero in on the use to which the logs were put. This is not the *White Mountain* test of preemption. New Mexico is taxing construction receipts, not education, and in a non-discriminatory manner. Jur. St. 52. The School Board's theory warrants no further examination by this Court.

2. This Court Has Already Declined To Hear the Same Issue This Term and It Should Do Likewise Here.

The substance of the question presented by this appeal is precisely the same as was rejected by this Court earlier this Term in *Mescalero Apache Tribe v. O'Cheskey*, No. 80-812, *cert. den.* ____ U.S. ____, 49 L.W. 3619 (February 23, 1981), 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991. There the issue was the taxability of a non-Indian construction contractor's gross receipts from building a resort complex on the Mescalero Apache Reservation. Here the contractor's gross receipts are from building a school complex. There the buildings were built with federal funds granted by the Economic Development Administration. Here the buildings were built with direct appropriations from Congress. The insignificance of these distinctions points to the same disposition of this appeal.

3. Congressional Funding of Construction by Direct Appropriations Does Not Preempt New Mexico's Tax.

No tribal funds whatsoever were used for construction of the school buildings for the Board. Jur. St. 46. Congress funded the School Board's construction program by a series of appropriations totaling well over $9 million to "Ramah Navajo School Board, Incorporated.[5] From this sole fact, and despite the absence of any language in the congressional appropriations prohibiting state taxes, Jur. St. 52, the School Board contends that the tax is preempted. Jur. St. 23. The contention is not valid. Congress makes direct appropriations to all manner of

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[5] See fn. 2.

entities without any effect on the state's powers to tax the local activity funded or made possible by the appropriation. For instance, even though government funds may be used for purchases by a federal defense contractor, a state may tax the contractor's receipts unless the contractor is the disclosed agent of the United States. *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110 (1954). Congress has, of course, near plenary power to preempt state taxes as it chooses, and it has explicitly done so from time to time with regard to New Mexico's taxes. Section 466 of P.L. 95-524 (the CETA Amendments of 1978), 92 Stat. 1909 (1978), for example, expressly ousts New Mexico from jurisdiction to tax the gross receipts of certain Job Corps centers. See Cong. Rec. (S.2157, Daily Ed., February 23, 1978). Another example is 15 U.S.C. §391 which, this Court held, ousted New Mexico of the ability to tax the generation of electricity in a way that Congress felt interfered with interstate commerce. *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979). Examples of expressly shielding federal money from all state taxes are 31 U.S.C. §742 (U.S. bonds) and 7 U.S.C. §2017 (food stamps). Consequently, the fact that Congress had not spoken with respect to the $9 plus million it gave to the School Board, much of it appropriated after construction had been budgeted to include the gross receipts tax, shows either that Congress intended not to preempt state taxes or that Congress had no intent whatever on the subject.

4. Other Issues Raised Are Without Merit.

It is well-settled that the Enabling Act for New Mexico, 36 Stat. 557 (1910), is of no significance here, for it is a disclaimer of proprietary interest only, not a disclaimer of governmental interest or of jurisdiction to tax non-Indians. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), *Mescalero Apache Tribe*

v. Jones, 411 U.S. 145 (1972), *Washington v. Confederated Tribes of Colville Indian Reservation,* 100 S.Ct. at 2082. Nor will the effect of the New Mexico Court of Appeals' decision be the creation of one rule for New Mexico Navajos and another for Arizona Navajos, as claimed by the School Board.[6] Jur. St. 24. New Mexico of course taxes construction receipts, and so does Arizona. Ariz. Rev. Stat. §42-1310.2(i). Nor do the Indian traders statutes, 25 U.S.C. §§261-264, have any bearing on this case. They were enacted "to protect Indians from becoming victims of fraud in dealing with persons selling goods," *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 100 S.Ct. 2592, 2596, and *Colville,* 100 S.Ct. at 2082, not to protect tribes or school boards when they enter into multi-million dollar construction contracts with the use of federal funds. Furthermore, the statutes speak of "articles" and "goods." They do not attempt to regulate rendering of construction services, which was what Lembke was doing. Tr. Proc. 162, 140; see §7-9-3(K) NMSA 1978.

CONCLUSION

The State of New Mexico respectfully submits that the questions raised by this appeal are so insubstantial as not to need further argument or examination. It moves the Court

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[6] Even if this were true, the claim would not be an appealable issue, for the states are not required to levy their taxes in a phalanx of uniformity. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), quoted in *Austin v. New Hampshire,* 420 U.S. 656, 661 (1975).

to dismiss the appeal or alternatively to affirm the judgment entered by the Court of Appeals of New Mexico.

Respectfully submitted,

Jeff Bingaman
Attorney General of New Mexico

Jan Unna
Special Assistant Attorney General
Rothstein, Bailey & Unna
136 Grant Avenue
Santa Fe, New Mexico 87501
(505) 988-8004

Gerald B. Richardson
Assistant Attorney General
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

Attorneys for Appellee

August, 1981

APPENDIX

7-9-2 Purpose.

The purpose of the Gross Receipts and Compensating Tax Act is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

7-9-3 Definitions.

C. "construction" means building, altering, repairing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project;
(2) building, stadium or other structure;
(3) airport, subway or similar facility;
(4) park, trail, athletic field, golf course or similar facility;
(5) dam, reservoir, canal, ditch or similar facility;
(6) sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
(7) sewerage, water, gas or other pipeline;
(8) transmission line;
(9) radio or other tower;
(10) water, oil or other storage tank;
(11) shaft, tunnel or other mining appurtenance; or
(12) similar work;

"construction" also means:

(13) leveling or clearing land;
(14) excavating earth;
(15) drilling wells of any type, including seismograph shot holes or core drilling; or
(16) similar work.

* * *

F. "gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any receipts from sales of tangible personal property handled on consignment but excludes cash discounts allowed and taken, New Mexico gross receipts tax payable on transactions for the reporting period and taxes imposed pursuant to the provisions of the County Sales Tax Act, the County Gross Receipts Tax Act or the Municipal Gross Receipts Tax Act which are payable on transactions for the reporting period and any type of time-price differential.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

When the sale of property or service is made under any type of charge, conditional or time-sales contract or the leasing of property is made under a leasing contract, the seller or lessor may elect to treat all receipts, excluding any type of time-price differential, under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount, excluding any type of time-price differential.

"Gross receipts," for the purpose of the business of buying, selling or promoting the purchase, sale or leasing, as an agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commission or fees derived from the business.

"Gross receipts" also includes amounts paid by members of any cooperative association or similar organization for sales

or leases of personal property or performance of services by such organization.

* * *

K. "service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling property. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling.

"Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property.

7-9-51 **Deduction; gross receipts tax; sale of tangible personal property to persons engaged in the construction business.**

A. Receipts from selling tangible personal property may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the seller.

B. The buyer delivering the nontaxable transaction certificate must incorporate the tangible personal property as:

(1) an ingredient or component part of a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or

(2) an ingredient or component part of a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

7-9-52 **Deduction; gross receipts tax; sale of construction services to persons engaged in the construction business.**

A. Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

B. The buyer delivering the nontaxable transaction certificate must have the construction services performed upon:

(1) a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or

(2) a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg & Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

September 1981

Blue Feather Press, Santa Fe, New Mexico

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM[1]

I
THE TAX INVOLVED IN THIS CASE IS ALREADY THE SUBJECT OF A RULING BY THIS COURT SUGGESTING THAT FEDERAL LAW PREEMPTS APPLICATION OF THE NEW MEXICO GROSS RECEIPTS TAX TO NON-INDIAN CONTRACTORS ON THE NAVAJO RESERVATION.

In *Tiffany Construction Co. v. Bureau of Revenue,* 448 U.S. 902 (1980), this Court took action questioning the imposition of New Mexico's gross receipts tax on the receipts of a non-Indian contractor doing road work on the Navajo Reservation upon a section of road built and maintained by the Bureau of Indian Affairs. The same tax, the same reservation, and the same activity, albeit in the far more sensitive area of Indian education, are involved here.

This Court granted Tiffany's petition for writ of certiorari, vacated the adverse judgement against Tiffany, and remanded with instructions to reconsider the case in light of *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980). The case has now proceeded again through the New Mexico courts, which have ruled against Tiffany once more. *Tiffany Construction Co. v. Bureau of Revenue,* N.M. 629 P. 2d 1233 (N.M. App.

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[1] Please refer to footnote 1 of the Jurisdictional Statement for compliance with Rule 28.1.

1980), affirmed in part and reversed in part N. M., 629 P. 2d 1225 (June 1, 1980). [2]

Tiffany is of particular interest because this Court granted certiorari, vacated the lower court's judgment, and remanded on facts which did not involve a "major national goal", 25 U.S.C. 450a(c), or a treaty obligation of the United States, 15 Stat. 669, as is the case here. Nor is *Mescalero* of help to the State because its facts are so different from both *Tiffany's* and ours, as noted by Senior Justice Sosa dissenting in the latest New Mexico Supreme Court decision in *Tiffany*, 629 P. 2d, at 1232-1233:

> The majority here upholds the State tax because it is a tax which falls directly upon the contractor and only indirectly upon the Tribe. They cite *Mescalero* for the proposition that an indirect tax on Indians is permissible, but fail to recognize that the indirect tax in *Mescalero* could be "passed on as the Tribe engages in its resort and other business" (625 F. 2d at 972), whereas the tax in this case cannot be passed on to anyone except the tribe itself. This, then, is the key distinction between the *Mescalero* case and this case since the Tenth Circuit Court of the Appeals repeatedly

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2. To the extent that New Mexico's motion relies on *Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cir. 1980), cert. den. ____ U.S. ____, 101 S. Ct. 1417, 67 L. Ed. 2d 383 (1981), Tiffany* must take precedence as a ruling on the merits over the denial of certiorari in *Mescalero. Parker v. Ellis*, 362 U.S. 574, 575-576 (1960), *Hicks v. Miranda*, 422 U.S. 332 (1975), and generally, 16 Wright and Miller, *Federal Practice and Procedure*, Section 4004, page 510.

> emphasized the fact that the tax could be passed on to the consumer. In addition, the construction of a resort complex is in the nature of a proprietary project of the Tribe for tourist consumption, whereas a road is in the nature of a public or governmental function which provides an essential service to the Tribe.[3]

This reasoning applies with even greater force to the nonprofit Navajo school involved here. In any event, the conflicting rulings of this Court, the Tenth Circuit Court of Appeals, and the New Mexico courts in *Tiffany, Mescalero,* and the instant case provide additional grounds for plenary consideration.

II

THE BUREAU OF REVENUE'S MOTION RESTS ON A CONCEPT OF PREEMPTION WHICH DOES NOT COMPORT WITH ESTABLISHED PRINCIPLES.

Contrary to the State's view, comprehensive federal regulations do cover every aspect of this project including the school construction activity itself, 25 CFR Part 274, the sale of construction materials (constituting one half the cost of the project), 25 CFR Part 252, and the very objective to which these activities were directed, Indian

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[3] The intense interest of the Navajo Tribe in the governmental function of education and in the Ramah school in particular is well documented in the record, which has been transmitted and filed as permitted by Rule 13, and in its motion for leave to file an *amicus* brief in support of Appellants' Jurisdictional Statement.

education, citations too numerous to set forth here (see Jurisdictional Statement, pages 10-14, and Appendices L, N, O, P, and Q). Indeed, the federal government's concern for Indian education pre-date the regulations as presently worded. President's Message on Indian Affairs, 1970 Pub. Papers 564 (1970).

In this case, Congress has tried to build a school for Navajo children. The State, however, would have this Court distinguish between Congress' goal to improve Indian education and the means it chose for doing so, the construction of school facilities. The State's motion depends on an erroneous trial court conclusion that "the state is not taxing education", Motion 2, when the uncontroverted evidence at trial disclosed that the State's tax directly prevented the completion of school and related facilities for which Congressional appropriations were specifically intended. Tr. Pr. 117-128, 202, 222-225, 229-230, 482-484. Navajo education was undeniably burdened by this levy, and therefore the impost constitutes a tax on Indian education in any ordinary sense. Given the manner in which the New Mexico gross receipts tax operates, New Mexico's levy on Lembke's receipts from this project placed an unavoidable financial burden on the Ramah Navajo School Board, a tribal organization under federal law, 25 U.S.C. 450 b (c), and thus depleted the resources needed to finish the project.

Nothing but the actuality that New Mexico's impost has directly impeded fulfillment of Congress' specific purpose at Ramah and the goals of self-government established by the Navajo Tribe and its tribal organization, the school board, is needed to trigger preemption. This point was graphically made in a case involving the same reservation and the same treaty in the unanimous decision in *McClanahan v. Arizona*

State Tax Comm'n, 411 U.S. 164, 174-175 (1973). Said the Court:

> The Treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions....When this canon (that doubtful expressions are to be resolved in favor of Indians) is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Indians from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law -*including state tax law* - to Indians on the Navajo Reservation. See *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S., at 687, 690; *Williams v. Lee,* supra, at 221-222. (emphasis added).[4]

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4. Although *McClanahan* opens with a disclaimer pointing out that it deals only with a direct state impost on an Indian, the citation to *Warren* above and the commentary in footnote 6, 411 U.S., at 170, clearly show a broader reach, since *Warren* in fact involved a gross receipts tax imposed on a non-Indian just like New Mexico's. Moreover, the decisions in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980) further demonstrate that state levies on non-Indians engaged in activities on Indian reservations protected by federal law or touching federal interests may be barred by preemption.

And see, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1970), *Hines V. Davidowitz*, 312 U.S. 52, 67 (1941), Tribe, *American Constitutional Law*, at 378, and *Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Reservations*, 64 Iowa Law R. 1459, 1477-1478 (1979).

If the Navajo Treaty preempts a state income tax, even though the Treaty does not expressly prohibit state taxation, then it surely must preempt a state tax which burdens an objective which is expressly mentioned in the Treaty — education. It simply cannot be denied that in this Treaty and in the specific construction appropriation acts for this Navajo school board, Congress evidenced an intention to prevent precisely the treasury raid perpetrated by the Bureau of Revenue. The absence of express prohibitions in either the Treaty or the acts is of no consequence, as this Court noted in *White Mountain*, 448 U.S., at 144:

> We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required. (citing *Warren*)

States including New Mexico contributed markedly to the shocking conditions in Indian education uncovered by the Special Senate Subcommittee on Indian Education in 1969.[5] When New Mexico closed Ramah Public High School in 1968, it helped precipitate particular Congressional concern for Ramah Navajos leading to the appropriations which are the subject of this ac-

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5. "Indian Education: A National Tragedy - A National Challenge", Report No. 91-501, 91st Congress, lst Session.

tion. In doing so, Congress has saved the State hundreds of thousands of dollars in State aid for the education of Ramah Navajos, more than off-setting the largely indirect services alluded to by the State, Motion 6. The law of preemption, especially in its Indian manifestation, will not permit the unconscionable taxing of a service and function so vital to America's Indian peoples as occurred here.

Unless this Court is content to permit wholesale erosion of the principles of *Warren, McClanahan, Williams, White Mountain,* and *Central Machinery* to occur, and with it the undermining of Congress' express commitment to improve Indian education generally and at Ramah in particular, it must deny the motion before it.

CONCLUSION

For the foregoing reasons, the motion of the Appellee Bureau of Revenue should be denied and the appeal set down for plenary consideration with briefs on the merits and oral argument, or summary reversal of the decision below should be entered.

Respectfully Submitted:
MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg, and Gross
P. O. Box 1447
Suite 40, Sena Plaza
Santa Fe, New Mexico 87501
Counsel for Appellants

September 1981.

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No. 80-2162

In The

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE JURISDICTIONAL STATEMENT AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

JURISDICTIONAL STATEMENT OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS

GEORGE P. VLASSIS
Katherine Ott
Vlassis & Ott
1545 W. Thomas Road
Phoenix, Arizona 85015
(602) 248-8811
Counsel for the Amicus Curiae

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MOTION FOR LEAVE TO FILE JURISDICTIONAL STATEMENT AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS.

The Navajo Tribe of Indians respectfully moves this Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for leave to file the annexed jurisdictional statement amicus curiae. In support of this motion, the Navajo Tribe states:

1. The Navajo Tribe of Indians (the Navajo Tribe) is a federally recognized Indian Tribe and is the largest such tribe in the United States, comprised of one hundred sixty thousand members and occupying 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah.

2. The issue presented in this case -- the extent, if any, of a state's power to tax the activities of non-Indians performing federally-funded, federally-regulated work on tribal lands -- will determine whether, after White Mountain Apache and Central Machinery,[1] Indian tribes must share with states those funds ear-marked by Congress to further the national interest in Indian education.

3. The outcome of this appeal will determine whether federally funded programs implementing rights guaranteed to the

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[1] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

Navajo Tribe by the Treaty of 1868 can be crippled by the diversionary interference of state taxation.

For the foregoing reasons, the Navajo Tribe of Indians respectfully requests that its motion for leave to file the annexed jurisdictional statement amicus curiae be granted.

Dated this ____ day of August, 1981.

GEORGE P. VLASSIS
Katherine Ott
VLASSIS & OTT
1545 W. Thomas Road
Phoenix, Arizona 85015
(602) 248-8811
Counsel for Amicus Curiae

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ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS

INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land in Arizona, New Mexico and Utah.

Numerous federally-funded programs are carried out on Navajo land with the help of services rendered by non-Indians. These services are taxed by the states, with the tax then passed through to the tribe to be paid with part of the federal funds.

States are notorious for their failure to provide governmental services to Indian peoples. Thus, funds diverted by the states from federal Indian programs are, for all practical purposes, lost to the tribe.

Where, as here, the federal funds are intended to build schools and where, as here, the federal government has by treaty committed itself to such school construction, the diversion by state tax laws of federal funds is particularly unconscionable and is, in fact, unlawful under the decisions of this Court.

THE QUESTIONS ARE SUBSTANTIAL

The questions concerning a state's taxing power, posited by the jurisdictional statement of the Ramah Navajo School Board Inc., are so substantial as to have been repeatedly addressed by this Court, although not before in the precise context of construction work on Indian lands in furtherance of treaty-guaranteed, federally-funded efforts to improve Indian education.

Time and time again this Court has found it necessary to address state taxation of non-Indians on tribal lands and time and time again the Court has rejected the mechanical application of a test of ethnicity in ruling on the propriety of the application of the state law. Instead, a balancing test has evolved which, on the one hand, weighs the interest of the state government in raising revenue and, on the other hand, weighs the

interest of the tribe in self-government together with the interest of the United States in protecting the federal trust relationship with Indians from disruption by the states.

Even the briefest review of the criteria applied by this Court in the area of state taxation of non-Indians on Indian lands demonstrates that the decision of the Court of Appeals of the State of New Mexico is in flagrant disregard of the guidelines established by this Court.

A. The Interest of the Navajo Tribe Is Strong.

This Court, in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), upheld a state tax on cigarettes, rejecting an argument that such a tax would impermissibly interfere with tribal self-government.

In so holding the Court pointedly observed that a tribe's interest in self-

government was strongest for on-reservation activities involving the tribe. Id at 156-7.

The Court expressed particular doubt that the tribe had any "significant interest" (Id. at 155) in the purchase of cigarettes imported for the "non-Indian bargain hunters." Id. at 145. The Ramah tax case presents the diametrical opposite. The construction of a school on Navajo lands for Navajo children is most certainly an on-reservation activity significantly involving the Tribe.

Moreover, in Colville the Court could see "no nonrevenue purposes to the tribal taxes here at issue." Id. at 158. With Ramah, the Tribe's interest in voiding the application of the New Mexico tax goes beyond a savings in tax money -- the tribe's interest in invalidating the state tax is directly related to the size and quality of educational facilities to be provided for Ramah children

B. The New Mexico Tax Impermissibly Impedes the Implementation of Federal Indian Policies Relating to Education.

This Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) determined that the federal interest in timber industries on tribal lands was supported by both federal funding and detailed federal regulations, the effect of which was to preempt the application of any state taxes. The Ramah case falls squarely within the Bracker holding.

The facts before this Court in Bracker closely parallel those before this Court in the present Ramah case. Both the timber industry in Bracker and the educational system in Ramah are of vast importance to the respective tribes. 448 U.S. at 138. In Bracker and in Ramah, federal funding of the tribal program is critical. Id. at 139. In Bracker the tribe contracted with a non-Indian to harvest the timber; in Ramah

the Tribe contracted with a non-Indian to build the school. Id. at 139. In Bracker, federal regulations controlled the timber industry. Id. at 145. In Ramah, federal laws and regulations controlled the use of funds and the relationships between the School Board and the contractor. See Federal statutes and regulations reviewed in detail in the Jurisdictional Statement of the Ramah Navajo School Board, Inc., at 11-14 and 21.

In Bracker federal policies implemented by comprehensive regulations preempted an Arizona tax law which disrupted the federal Indian policies with respect to timber. Id. at 151. In Ramah comprehensive federal regulations should also preempt a New Mexico tax law which disrupts the federal Indian policy regarding the education of Navajo children.

C. The New Mexico Tax Impedes the Implementation of Federal Indian Policies Relating to Traders.

The decision of this Court in Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) reaffirmed a prior ruling in Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). In each case this Court found that federal regulation of Indian traders was so comprehensive as to preempt the application of state tax laws to Indian traders. Because Central Machinery involved an unlicensed trader, the Ramah case fits precisely within its holding.

In Central Machinery there was an on-reservation sale of goods to a tribe by a non-Indian, not licensed as an Indian trader. Id. at 161. In Ramah there is an on-reservation sale of construction services to theNavajo Ramah School Board by a non-Indian contractor, also not licensed as an Indian trader.

Federal regulations applicable since 1976 to the Navajo Tribe encompass the provision of on-reservation services at a fixed location. 25 C.F.R. Part 252. In Central Machinery this Court held that it was the existence of such regulation which pre-empted state tax laws, not whether or not the regulations had in a particular instance been applied. 448 U.S. at 165.

In Central Machinery this Court reaffirmed the preemptive force of the federal Indian trader regulations. Id. at 166. It is this preemptive force which nullifies the application of the New Mexico tax to the non-Indian contractor providing construction services for the Ramah Navajo School Board.

CONCLUSION

The formal schooling of Navajo children was originally a goal solely of the federal government imposed by force upon the Navajo people. Treaty of 1868, Art. VI.

The Navajo Tribe has long since wholeheartedly embraced this goal and, with the help of federal funds, has in recent years done much to eradicate illiteracy among the younger generations. Diversion of federal funds intended to build Navajo schools by state tax laws is thus a serious infringement of Navajo self-government with profound consequences for the future well-being of the Navajo people. Moreover, the federal interest here involved has been encapsulized by detailed, comprehensive regulation; and such regulations, under the decisions of this Court, preempt the tax laws of the State of New Mexico.

For all the foregoing reasons, the Navajo Tribe submits as amicus curiae that the questions presented by the Ramah Navajo School Board for review by this Court are so substantial as to require plenary consideration, with briefs on the merits and

oral argument, for their resolution. The Navajo Tribe further submits that in this instance summary reversal would be appropriate.

Respectfully submitted

GEORGE P. VLASSIS
Katherine Ott
Vlassis & Ott
1545 W. Thomas Road
Phoenix, Arizona 85015
(602) 248-8811

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, George P. Vlassis, attorney for the amicus curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing Motion and Jurisdictional Statement, and specifically that on August __, 1981, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing Motion and Jurisdictional Statement addressed to each of the following:

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmbeg & Gross
P. O. Box 1447
Santa Fe, New Mexico 87501

Attorneys for Appellants Ramah Navajo School Board, Inc., and Lembke Construction Co., Inc.

GERALD B. RICHARDSON
Office of the Attorney General
P. O. Box 630
Santa Fe, New Mexico 87509

Attorneys for Appellee Bureau of Revenue, State of New Mexico

JAN UNNA
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

Attorneys for Appellee Bureau of Revenue,
State of New Mexico

George P. Vlassis

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In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 5, 1981, inviting the Solicitor General to state the views of the United States.

It is with reluctance that we urge the Court to grant review in another Indian case. We do so, however, because it seems apparent that both the state and federal courts require further guidance in the "vexing area" of State taxation of business activities within Indian Reservations. *Washington* v. *Confederated Tribes*, 447 U.S. 134, 138 (1980).

1. The decisions of this Court have definitively settled that both the Tribe and the individual members enjoy immunity from State taxes with respect to their lands, property, income or activities within the Reservation. *E.g.*, *The Kansas Indians*, 72 U.S.

(5 Wall.) 737 (1867); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 475-481 (1976); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 162-164. So, also, the Court has made clear that the State may tax non-Indian property, income or activities within a Reservation when there is only a tenuous and remote connection with tribal interests, or when the Reservation situs of the transaction is fortuitous. *E.g.*, *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885); *Thomas* v. *Gay*, 169 U.S. 264 (1898); *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 481-483; *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 154-159. See, also, *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 18-21. On the other hand, the Court has held exempt from State taxation certain activities or transactions of non-Indians doing business with the Tribe within Reservation boundaries. *E.g.*, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980). But the scope of this last rule has not been fully understood.

As we read *White Mountain Apache* and *Central Machinery*, the governing principles are these:

(a) The fact that the legal incidence of a State tax falls on non-Indians is not dispositive when the financial impact is on the Tribe;

(b) Federal law may pre-empt such taxation even though no treaty or statutory provision expressly addresses the question and even though there is not the plainly irreconcilable conflict between federal regulation and State taxation that alone would support a finding of preemption in a different context;

(c) Relevant considerations in determining whether State taxation is permissible include:

(1) The situs of the activity or transaction on the Reservation, at least if that situs is not fortuitous or contrived;

(2) The degree and continuing character of tribal involvement in the taxed activity or transaction;

(3) The importance of the tribal interests affected; and,

(4) The extent of federal regulation over the activity or transaction, mindful that it is the existence of the federal regulatory scheme, not its implementation in the specific instance, that matters.

2. We believe the New Mexico courts ignored these guidelines in the present case. At issue here was a substantial construction undertaking, necessarily occurring on the Reservation, wholly financed by specific congressional appropriations, closely regulated by federal law, involving a long continuing course of dealings between the contractor and a tribal agency, directly affecting the vital tribal concern with the education of its young members and implementing particularized congressional objectives. The economic burden of the tax was immediately passed on to a tribal governmental agency. On the other side of the balance, there was little more than the State's generalized interest in raising revenue. Accordingly, the case seems to us to be plainly within the principles announced by this Court in *White Mountain Apache* and *Central Machinery*.

Nor did the New Mexico Court of Appeals satisfactorily explain its reasons for holding those precedents inapplicable. Both the original opinion (J.S.

App. 27-34) and the opinion denying rehearing (J.S. App. 36-37) stress the legal incidence of the tax as falling on non-Indians as the dispositive consideration. *White Mountain Apache* is distinguished as involving timber harvesting and use of Bureau of Indian Affairs roads, activities subject to "pervasive" federal regulation (J.S. App. 36). But nothing is said of the comparable regulations governing Indian schools or their construction. And *Central Machinery* is confined to a holding construing the Indian trader statutes (*ibid.*), which is treated as wholly irrelevant where services, rather than goods, are sold, and different statutes are in play.

3. Regrettably, the present decision is not an isolated instance. If we focus only on like cases that have reached this Court in the past eighteen months, we find that the United States Court of Appeals for the Tenth Circuit has apparently failed to apply the teaching of *White Mountain Apache* and *Central Machinery* in deciding *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F.2d 967 (1980), cert. denied, No. 80-812 (Feb. 23, 1981), and that the New Mexico courts have elsewhere similarly disregarded the controlling principles. *Tiffany Construction Co.* v. *Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1979), vacated and remanded, 448 U.S. 902, judgment re-instated, 629 P.2d 1233 (Ct. App. 1980), aff'd, 629 P.2d 1225 (Sup. Ct. 1981), petition for cert. submitted Oct. 5, 1981, but not docketed because untimely. The upshot is that the lesson of *White Mountain Apache* and *Central Machinery Co.* has not been learned. Predictably, some courts will continue to distinguish those cases and decline to follow their teaching. Unless this Court now intervenes, it is likely that such precedents will accumulate and, in due course, will submerge the rule that non-Indian dealings with Tribes are, in many cir-

cumstances, exempt from State-imposed burdens. The issue may be of marginal significance to the other parties, but it is critically important to most Indian Tribes and to the national policy of promoting tribal self-sufficiency.

In different circumstances, it would be enough to vacate the judgment below and remand the case for further consideration. But the action of the New Mexico courts after such an order in the *Tiffany Construction* case indicates that a clearer mandate from this Court is necessary. Moreover, here, the New Mexico Court of Appeals, on a motion for rehearing, expressly considered and purported to distinguish *White Mountain Apache* and *Central Machinery* (J.S. App. 36-37), and the Supreme Court of New Mexico, having granted review (J.S. App. 38-40), later quashed its writ and declined to interfere (J.S. App. 41). In this situation, we urge the Court to note probable jurisdiction and finally to decide the controversy.[1]

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

OCTOBER 1981

[1] The Court's actions in *Warren Trading Post, supra,* 380 U.S. at 686, and *Central Machinery, supra,* 448 U.S. at 163, indicate that review by appeal is proper under 28 U.S.C. 1257(2). But, of course, review by certiorari, as in *White Mountain Apache* and *Tiffany Construction,* is also available. See 28 U.S.C. 2103.

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ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRIEF OF RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC.

Of Counsel:
Neal A. Jackson
Sanford, Adams,
McCullough and Beard
Washington, D.C. 20005
1156 Fifteenth St., N.W.
January 1982

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmberg & Gross
P.O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

Blue Feather Prss, Ltd. Santa Fe, New Mexico

QUESTIONS PRESENTED[1]

1. Is New Mexico's gross receipts tax repugnant to the Constitution, laws and treaties of the United States because it impermissibly interferes with essential Navajo Tribal relations and self-government by impeding the construction of a school for Navajo children on the Navajo Reservation by Appellant Navajo School Board?

2. Is New Mexico's tax repugnant to the Constitution, laws, and treaties of the United States because it impermissibly burdens, interferes with, and hampers Federal programs to improve Indian education and promote Navajo self-determination?

3. Is New Mexico's tax preempted by Federal laws regulating commercial transactions on the Navajo Reservation.

4. Is New Mexico's tax precluded by the New Mexico Enabling Act and the lack of State jurisdiction over Indians and Indian property on the Navajo Reservation?

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1. The caption lists all parties. Please refer to footnote 1 of the Jurisdictional Statement for compliance with Rule 28.1.

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OPINIONS BELOW

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JURISDICTION

This is a civil action for recovery of State gross receipts taxes by a Navajo tribal school board and its non-Indian building contractor. The bases for the claim are that the tax impermissibly interferes with Navajo tribal self-government and that the tax is preempted by Federal laws and the Navajo Treaty of 1868. On July 1, 1980, the New Mexico Court of Appeals affirmed a judgment denying the claim (JS, App. A) and on July 11, 1980, the same court denied Appellants' petition for rehearing. (JS, App. B). On August 14, 1980, the New Mexico Supreme Court granted a petition for writ of certiorari to review the decision of the New Mexico Court of Appeals. (JS, App. C). After briefs were filed, including one from the Navajo Nation as *amicus curiae*, the New Mexico Supreme Court, on March 30, 1981, quashed its writ of certiorari as improvidently granted. (JS, App. D). Notice of appeal to this Court was filed May 11, 1981. (JS, App. I). An amended Notice was filed May 22, 1981. (JS, App. J). This appeal was docketed June 22, 1981. On November 30, 1981, this Court noted probable jurisdiction.

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(2).

TREATY, STATUTES AND REGULATIONS INVOLVED

1. Treaty of 1868 by and between the United States and the Navajo Tribe of Indians, concluded June 1, 1968, proclaimed August 2, 1868, 15 Stat. 667, 669, Article 6. (JS 10).
2. Statutes:
   A. Appropriations Acts: Public Law 92-369, 86 Stat. 510 (JA 118); Public Law 93-120, 87 Stat. 431; Public Law 93-245, 87 Stat. 1073; Public Law 93-404, 88 Stat. 810; Public Law 94-165, 89 Stat. 985; Public Law 95-74, 91 Stat. 293. (JS 11-12).
   B. The New Mexico Gross Receipts and Compensating Tax Act, secs. 7-9-1 through 7-9-81, N.M.S.A. 1978; and Municipal Gross Receipts Tax Act, secs. 7-19-1, *et. seq.*, N.M.S.A., 1978. (JS, App. K).
   C. The Indian Self-Determination And Education Assistance Act of 1975, 25 U.S.C. 450 *et. seq.*, Public Law 93-638, 88 Stat. 2203. (JS, App. L).
   D. The Johnson O'Malley Act, 25 U.S.C. 452, 48 Stat. 596, as amended, 49 Stat. 1458. (JS 12-13).
   E. 25 U.S.C. 261-264, 19 Stat. 200, 22 Stat. 179, 31 Stat. 1066, 32 Stat. 1009. (JS 13-14, App. to Br. A-10 to A-11).
   F. New Mexico Enabling Act and Disclaimer of Jurisdiction Over Indian Lands, 36 Stat. 558-559 § 2(B); N.M. Const. Art. XXI, sec. 2. (JS, App. M).
   G Snyder Act, 25 U.S.C. 13, 42 Stat. 208. (JS, App.N).
3. Regulations:
   A. 25 C.F.R. Parts 271 and 274. (JS, App. O; App. to Br. A-1 to A-3)
   B. 25 C.F.R. Part 31a (JS, App. O; App to Br. A-3 to A-4)
   C. 25 C.F.R. Part 252. (JS, App. Q)
   D. 41 C.F.R. 14H-70. (Appr. to Br. A-4 to A-7).

STATEMENT OF THE CASE

In 1968, the State of New Mexico closed the only high school accessible to the children of the Ramah Navajo Chapter, a political subdivision of the Navajo Tribe. (Tr. 178, 193-194; Ex. P-43, Tr. 181, 184, JA 124; Ex. D-C, Tr. 186, JA 133). As a result, Ramah Navajo high school children were compelled to seek their educations far from home at Federal Indian boarding schools or not go to school at all. (Tr. 52, 115, 178, 181, 219-220, 234, JA 79; Ex. P-12, Tr. 38, 64, 65, 67, JA 116).

After an unsuccessful lawsuit to reopen the school, *Ben Jose v. Gallup-McKinley County School District,* No. 12,913, Eleventh Judicial District of New Mexico. (Tr. 181, 186; Ex. P-43) (JA 124), the Ramah Navajo Chapter, in early 1970, organized its own school board under authority of the Navajo Tribal Council, Title 10, Sec. 51, Navajo Tribal Code. (Tr. 41; Ex. P-1(a), Tr. 38, JA 114; Ex. P-46, Tr. 192, JA 128; Ex. P-4, Tr. 78, 81, 83).

The Chapter instructed the new board to seek funds for and operate a new Chapter-sponsored school on the reservation to replace the one closed by the State. (P-46, Tr. 192, JA 128; P-12, Tr. 38, JA 116; Tr. 178-179). The Board was and is sanctioned as a tribal organization of the Navajo Tribe. (JA 32, 41, 119). Because state incorporation was required by its prospective funding source, the Bureau of Indian Affairs, the Board also obtained a New Mexico nonprofit charter. (Tr. 72, JA 41; JA 51; Ex. P-1, Tr. 38, JA 112-113).

In the spring of 1970, the BIA agreed to provide funds to the Ramah Navajo School Board for operation of a new school program to be housed in the abandoned public school facility in Ramah Village until a new school facility could be built. (Tr. 51, 188, 202; JA 67). The Navajo Tribe contributed money for renovation of this old structure. (Tr. 122).

Using this makeshift facility (Tr. 51), the Board created the first school started from scratch by an Indian community in modern times (Tr. 91). President Nixon hailed this achievement as a "notable example" of Indian self-determination in his Message to Congress on Indian Affairs, July 8, 1970, 6 Weekly Comp. of Pres. Documents (1970) 894, 899. Five years later, the new Executive policy to promote Indian self-determination became codified in The Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203, the Board contributing to its legislative history. (Tr. 92). *See, e.g.*, Hearings, Congress Subcomm. on Indian Affairs, on S. 1017, June 1 and 4, 1973, at 126-133, 230.

Two years after its formation, with help from Senator Joseph M. Montoya, the Navajo Board successfully solicited funds for design of a new school facility. Pub.L. 92-369, 86 Stat. 510 (Ex. P-21, Tr. 38, JA 118; JA 39-40). In keeping with self-determination, these funds were granted directly to the Board, which proceeded to hire an architect and design its own school. (Ex. P-21, Tr. 38, JA 118, Tr. 116). In 1973, Congress first provided monies for construction of the new school. (JS 11). Because of fear that the BIA might divert these monies for other projects if the appropriation Act did not specifically earmark the funds to the Board, Congress later amended Public Law 93-120 to add such a directive. (JS 11, JA 39,40; Tr. 71).

This amendment removed any uncertainty as to Congress' intentions in three ways. It expressly directed the funds to the Ramah Navajo School Board; it specified that the funds were to be used "for construction of school facilities"; and it omitted language common to appropriations acts by which "not to exceed" so and so much money is allocated to a given project, thus denying the BIA any discretion over how much money would go to the Board.

Three subsequent appropriations were similarly worded, except that these did contain the "not to exceed" language. (JS 11-12). In consequence of these statutes Ramah Navajo School Board has legal title to the facilities. (Tr. 187, Ex. P-29, par. 11, Tr. 38, JA 120).

As with the design, the Board thus became directly responsible for the construction of its own school. (Tr. 60-66, JA 39-41, 49). To proceed with the work, the Board solicited bids from building contractors. Only two firms, both non-Indian owned, responded (JA 33-34, 43). Both treated New Mexico's gross receipts tax as a cost of construction to be passed on to the Board. (JA 33-34, 37-38, 58-59, 61, 63). The low bidder was Lembke. It won the award of the first construction contract. (JA 43; Ex. P-34, Tr. 38). In the Board's master contracts with the BIA (P-29, JA 120, P-30, P-31, P-32; Tr. 38 by Stip.), the Board was required to include certain standard clauses governing bonding, pay scales, and pricing among other things in its subcontracts with the builder. (Id. and Tr. 171-172, App. to Br. A-4 to A-7). Each of the Board's contracts with Lembke specifies that Lembke is to pay all "required" taxes. (P-34, P-35, P-36 all at Tr. 38 by Stip. JA 33, 121). However, Lembke, in keeping with standard business practices, insisted that the Ramah Navajo School Board reimburse Lembke for all taxes which the builder thus pays. (JA 58-59, 61; Ex. P-34, Tr. 38; Ex. P-40, Tr. 38).

New Mexico's gross receipts tax, the subject of this action, is universally passed on in this way to consumers in the construction industry. (JA-33-34, 37-38, 58-59, 61, 63). The tax thus operates as a sales tax. Sellers of goods and services act as legally-liable collection agents for the State but consumers actually pay the tax as part of the price charged by the seller. Lembke would not have contracted with the Navajo Board had it not secured a promise of reimburse-

ment for the gross receipts taxes it would have to pay New Mexico. (JA 59).

Starting in late 1974 Lembke proceeded to construct the school. All construction, lasting over five years (P-34, P-34(a), P-35, P-36, all at Tr. 38 by Stip.), occurred on the Ramah Chapter's portion of the Navajo Reservation (JA 33, 38) on Navajo trust lands leased to the Board by the Navajo Tribe. (JA 39). New Mexico levied its tax on Lembke's receipts from the Ramah Navajo school construction project and in turn Lembke charged the full cost of the tax to the Board. As required by Lembke, the Board reimbursed the builder the full amount of the tax. (JA 34). Taxes paid by the Board in this manner by the date of trial totalled $232,264.38 and the Board continued to pay the tax in this fashion on the remainder of work to construct its library (media center), its last phase, pending the final disposition of this case. (JA 27, 34). Lembke has agreed to repay the School Board any rebate or recovery it realizes as a result of this action. (JA 34).

The new facility built by Lembke houses both an elementary and a high school, as well as health and support facilities. (Tr. 244). Enrollment at date of trial was 450 Navajo children, representing 93% of the eligible Ramah Navajo school population. (JA 34). Before formation of the Board, only one or two Ramah Navajos had ever gone to college; since its opening in 1970, the Ramah Navajo school has sent between 50 and 60 Ramah Navajos to college. (JA 52).

In substantial part, however, because of the gross receipts taxes paid on this project to New Mexico, the Board has been unable to complete the educational and related facilities it has planned. (JA 52-53, 70-71). The Board has been forced to convert a planned vocational instruction area into a makeshift cafeteria and still lacks all the

classrooms it needs plus permanent offices, and landscaping. (JA 52-57, 65-66, 68-69, 73-75, 77-78). As a result, the school is overcrowded and the quality of its eductional programs has suffered. (JA 54-56, 65-66, 74-77).

SUMMARY OF ARGUMENT

I. New Mexico's gross receipts tax has impeded a Navajo Tribal school board's construction of a school for Navajo children on the Navajo Reservation with funds appropriated directly to it by Congress.

The tax thus "frustrates tribal self-government, *see, Williams v. Lee,* 358 U.S. 217, 219-220 (1959)," *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976), because it interferes with an essential function of Navajo self-government, education, "the very foundation of good citizenship". *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

Education's importance to the Navajo Tribe was first acknowledged by both the Tribe and the United States in the Treaty of 1868, Article 6, 15 Stat. 669, JS 10, under which "the necessity of education is admitted" and under which the United States is obligated to construct and staff school "houses" for every thirty Navajo children of school age who "can be induced or compelled to attend school". Although the United States failed to honor its treaty pledge for many years following the treaty's signing, the Federal Government has recognized a continuing commitment to provide education services to the Navajos under this provision, as noted in *Warren Trading Post Co. v. Arizona Tax Comm'n.* 380 U.S. 685, at 690 (1965). Now the United States as well as the Tribe is committed to local Navajo community control of schools through a process called Indian self-determination designed to put decision-making power over Federal programs, especially education, into the

hands of tribes and tribal organizations. The Ramah Navajo School Board's example helped fuel passage in early 1975 of the Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, (JS 70-71).

In contrast, New Mexico at trial made no effort to justify its tax on the basis of regulatory objectives of any kind or of services or benefits to its ostensible taxpayer, Lembke. Instead, the State attempted to show only that it provides services to Ramah Navajos, a factor which has never been considered dispositive in cases of this sort. *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 476 (1976). In any event, the testimony of the State's sole witness was severely impeached. (JA 94-109).

Because balancing the interests in this case clearly favors the Navajo tribal school board, the tax in question must be declared invalid. Imposition of this sales tax, as this Court has characterized the New Mexico gross receipts tax, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 146 (1973), has resulted in unbuilt classrooms, unbuilt permanent administrative offices, and a makeshift cafeteria, which substitutes for a planned vocational instruction area, among other things, at the Pine Hill School operated by the Ramah Navajo School Board and consequently has had a detrimental effect on the quality of educational programs at the school. The tax has plainly interfered with and frustrated tribal self-government in violation of the rule in *Williams v. Lee,* 358 U.S. 217 (1959).

II. The tax conflicts with a pervasive scheme for the improvement of Indian education, "a major national goal", 25 U.S.C. 450a(c), and for promotion of Indian self-determination, 25 U.S.C. 450a(b). The tax is therefore preempted by Federal law. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980);

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

Myriad Federal laws on Indian education, Indian school construction, self-determination, and this very project, constitute a scheme for the improvement of Indian education generally and for Ramah Navajo children in particular at least as preemptive as the Federal Indian trader regulations involved in *Warren Trading Post Co.* 380 U.S. 685 (1965), where Arizona's gross receipts tax was declared invalid as imposed on a licensed Indian trader on the Navajo Reservation, and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); and the forestry regulations in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where Arizona again tried to tax a non-Indian enterprise doing business with a tribe on a reservation.

Federal policy is firmly committed to provision of adequate educational facilities for Indian children. 25 C.F.R. 31a4(s) (App. to Br.A-4). The State's tax conflicts with this pervasive scheme and its policies in a variety of ways. It hampers the goal of providing Ramah Navajo children "a supportive environment for learning, living and education", 25 C.F.R. 31a.4(s). It inserts financial factors into the calculations of a tribal organization about contracting to construct its own school not contemplated by Congress. 41 C.F.R. Part 14H-70. And it tends to defeat Congress' purpose in the appropriations to this Navajo Board to construct "school facilities".

III. In exactly the same way, New Mexico's gross receipts tax has interfered with another comprehensive Federal scheme involved in this case, the regulation of commercial transactions on the Navajo Reservation under the Indian trader statutes, 25 U.S.C. 261-264 (JS 13-14, App. to Br. A-10, A-11)

Lembke's business activities took place exclusively on the

Ramah Navajo Reservation on Navajo trust lands leased to the Ramah Navajo School Board. (JA 32-33) (Findings 5 and 10, JS 45-46). Those activities encompassed the sale of construction materials approximating one half the cost of the project (Tr. 163-164) as well as actual construction. Under 25 C.F.R. Part 252 (JS 86-87), sales of "goods and services" by non-Indians on the Navajo Reservation require licenses from the Bureau of Indian Affairs. These regulations contrast with the less inclusive, less restrictive Indian trader regulations, which do not expressly encompass "services", applicable to other reservations, 25 C.F.R. Part 251.

Lembke's subcontracts with the Ramah Navajo School Board were subject to intensive administrative agency requirements, especially regarding price, similar to those imposed on the non-Indian forestry transportation company in *White Mountain*, 448 U.S. 136 (1980). (App to Br. A-2 to A-7) The same kind of tax, the same reservation, and the same detrimental impact on the Federal Indian trader scheme that proved critical in *Warren Trading Post Co.* are involved here. Neither the language nor the legislative history of the trader statutes discloses an intent to exclude construction work by non-Indians on reservations from their ambit. Both *White Mountain* and *Central Machinery Co.* are therefore directly on point and dispose of this case.

IV. States may not levy taxes on Indians or Indian property on reservations without express Congressional authorization to do so. This rule and New Mexico's Disclaimer of Jurisdiction over Indian lands, 36 Stat. 558-559, sec. § 2(b), N.M. Const., Art. XXI, sec. 2 (JS 75-76), also preclude extension of New Mexico's tax to Appellant Navajos on the Navajo Reservation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 174-175, 181 (1973).

New Mexico's gross receipts tax is not a true income tax as

labeled by the State. It is a sales tax, as this Court has noted, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145-146 (1973). And see *McClanahan, supra*, 411 U.S., at 174-175, the burden of which is born by consumers.

The Ramah Navajo School Board's non-profit charter (Ex. P-1, Tr. 38, JA 112) restricts its actions to "educational and charitable" activities. It is a school, not a resort. For this reason, the Navajo Board cannot pass on the tax burden involved here to anyone else. As a result its students, 450 Navajos of the Ramah Navajo Chapter, a tribal subdivision, have been forced to make do with facilities less extensive and less complete than contemplated by their own School Board, their Tribe, and the Federal Government. Under the present circumstances New Mexico's tax has operated as a direct tax on a Navajo tribal organization on the Navajo Reservation, (JS 45), and thus violates the *McClanahan* rule.

The decision below therefore conflicts with the clear precedents of this Court and must be reversed. U.S. Const., Art. I, § 8, cl. 3; Art. VI, cl. 2.

ARGUMENT

This case involves a conflict between the taxing power of a State and a comprehensive Federal-Tribal scheme for the improvement of Indian education, "a major national goal." 25 U.S.C. sec. 450a(c). (JS 71).

In similar cases involving non-Indians[2] two related rules

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2. Recent tax conflicts of this sort reviewed by this Court include:
Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965), in which Arizona's gross receipts tax was unanimously declared preempted by federal Indian trader regulations on the Navajo Reservation.
Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1973), in which State cigarette sales taxes and personal property taxes were invalidated as applied to Indian-only transactions on a reservation but which permitted

for decision have been fashioned. First, State action may be invalid because it "frustrates tribal self-government, see *Williams v. Lee,* 358 U.S. 217, 219-220 (1959)", *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, at 483 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 179 (1973). Second, even where there is no effect on tribal self-government, State action may be invalid because "the exercise of such authority may be preempted by federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980), citing *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965).

Under either test, New Mexico's gross receipts tax was impermissibly levied on the contractor's school construction

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the State to require Indian sellers to collect cigarette sales taxes from non-Indian purchasers and pay them to the State.

Washington v. Conf. Tribes of Colville Res., 447 U.S. 134 (1980), in which several State taxes imposed on or affecting Indian property were declared unenforceable but State sales and cigarette excise taxes on non-Indians were upheld against a claim of tribal preemption on grounds the economic interest of the Tribe was created solely through an artificial tax haven.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), in which a comprehensive federal scheme regulating and protecting a tribal forestry enterprise was held preemptive of State gross receipts and motor vehicle use and fuel taxes imposed on a non-Indian company doing business wholly within the reservation.

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), in which the federal Indian trader statutes were held to preempt an Arizona sales tax imposed on a one-time reservation sale of farm equipment to a tribal enterprise by an unlicensed non-Indian salesman without a permanent business location on the reservation.

Tiffany Const. Co. v. New Mexico Taxation and Revenue Dept., 448 U.S. 902 (1980). No opinion rendered, but the case reversed and remanded in light of *White Mountain* and *Central Machinery,* in a case involving a non-Indian, foreign corporation doing road work on a BIA road on the Navajo Reservation.

receipts from the Ramah Navajo School Board in this case. The Navajo Board paid the tax and could not avoid doing so. Because the question here involves the purported exercise of State authority over a non-Indian company engaged in business activities on the Navajo Reservation, the "inquiry here is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but (calls for) a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144-145 (1980).

I. NEW MEXICO'S TAX HAS FRUSTRATED A VITAL NAVAJO GOVERNMENTAL FUNCTION AND IS THEREFORE BARRED BY *WILLIAMS V. LEE,* 358 U.S. 217 (1959).

A. The Navajo Tribe's Interests in Completing The Ramah Navajo School Are Fundamental And Have Been Impeded By New Mexico's Tax

At least since its decision in *Brown v. Board of Education,* 347 U.S. 483, 493 (1954), this Court has recognized the central importance of education for effective self-government:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public

> responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[3]

For Navajos, this understanding predates *Brown v. Board of Education* by some eighty-six years. Following their incarceration in an army camp at Fort Sumner, New Mexico, in the 1860's, the Tribe entered into a solemn treaty with the United States in 1868. 15 Stat. 667, 669, JS 10. That treaty contains an entire clause devoted to education opening with these words:

> In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted *****[4]

Despite the treaty language, the United States for many

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[3] Nothing in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1974) detracts from the force of this statement, since *Rodriguez* concerned only the question whether educational malapportionment of school district valuations in Texas should be reviewed under a strict or ordinary equal protection test. The Court held that education is not a fundamental right guaranteed by the Constitution. We, of course, do not argue the contrary, resting entirely on the treaty and laws enacted by Congress which statutorily afford the right to Indians and Ramah Navajos in particular.See *Id.*, 411 U.S., at 30.

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[4] The United States has recognized a continuing commitment to furnish education services to the Navajos under this provision, as this Court noted in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965):

> Congress has since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. *And in compliance with its treaty obligations* the Federal Government has provided for roads, *education* and all other services needed by the Indians. (emphasis added)

years after 1868 failed to provide adequate education services to Navajos.[5] In fact it was not until after World War II and increasing pressure from the Navajo Tribe that Congress and the Bureau of Indian Affairs made any real effort to fulfill the treaty commitment regarding a school and teacher for every thirty Navajo children of school age, and at Ramah not until 1970.[6] (JA 64; P-12, Tr. 38, JA 116; Tr. 178).

In addition to its actions in support of the Ramah Navajo School Board and the Tribal statements cited above, the importance of education to the Tribe was conclusively established at the trial of this cause through several witnesses. (JA 48-49, 65, 73, 78). Moreover, the State has conceded that "education is clearly a function of self-government" (Tr. 31) and "that education is a sovereign function". (Tr. 335).

This tax has directly interfered with this sovereign function of the Navajo Tribe through its political subdivision,

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5. In World War II, 88% of Navajo males aged 18 to 35 were considered illiterate by the Selective Service system. "The Education of American Indians: A Survey of the Literature", Special Senate Subcommittee on Indian Education, Committee Print, 91st Congress, 1st Session, February 1969, page 13.

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6. In the decades since World War II, the Tribe has taken increasingly vigorous steps to make education a cornerstone of tribal policy. At first these steps were aimed at simply getting Navajo children into school near their homes. Federal policy at the time favored public schools for Indian children, so Navajo tribal actions centered on encouraging Navajo children in the direction of public schools. When Federal policy changed towards self-determination, de-emphasizing public schools, Navajo policy changed accordingly, as seen in the codification of Navajo education laws contained in Title 10 of the Navajo Tribal Code, as well as Exhibits P-3 through P-11 (Tr. 36,78-83, See Exhibit Table JA 10), (App. to Br. A-7 to A-9) (Ex. P-1(a), Tr. 38, JA 114-116)

the Ramah Navajo Chapter, and its educational agency, the Ramah Navajo School Board. The record conclusively establishes that the tax in question has resulted in a direct loss to the Navajo School Board of over $232,000 (and an unspecified additional amount since date of trial). The State so stipulated at trial. (JA 34). The Board's educational program has suffered accordingly. (JA 52-57, 65-66, 68-69, 73-75, 77-78). Finally, the Board, was unable to avoid paying the tax.

The record shows that the economic burden inevitably and unavoidably fell on the Navajo school because New Mexico's tax is almost always passed on to consumers of goods and services, universally so in construction work. (JA 33-34, 37, 38, 58-59, 62, 63). In these circumstances, then, New Mexico's contention that it is only taxing the non-Indian contractor ignores the economic forces surrounding this project. Because of these forces, the tax's effect is indistinguishable from the interference with Navajo education that would have resulted had New Mexico simply enacted a law forbidding the Ramah Navajo School Board's construction of certain educational facilities. The true nature of New Mexico's gross receipts tax, moreover, has not escaped the attention of this Court. When dealing with this very tax in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973), this Court characterized it as a "sales tax", meaning a tax on consumers rather than an income tax on sellers as labeled by the State.

When demand for construction services is price inelastic,[7] as at Ramah, where it will be remembered there were only two bidders and where the funds at issue could be

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7. See Barsh, "Issues in Federal, State and Tribal Taxation of Reservation Wealth: A Survey and Critique", 54 Washington Law Rev. 531, 537-540.

used only for construction, sellers are economically free to demand that the consumer absorb the tax. Both bidders included the tax as part of their bids and Neil Ullery, Lembke's treasurer, testified that contractors treat the tax as a normal cost of doing business and that they would soon go broke if they did not pass on the tax in this fashion. (JA 33-34, 58-60).

Both New Mexico and Federal courts have acknowledged this characteristic of the New Mexico gross receipts tax. *Evco v. Jones,* 81 N.M. 724, 472 P.2d 987, at 992 (1970), cert. den. 81 N.M. 772 (1970); *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063, at 1072 (D.N.M. 1977), aff'd 625 F.2d 967 (10th Cir. 1980), cert. den. 101 U.S. 1417 (1981). Additionally, because it is a non-profit operation, the Board could not in turn pass on this tax burden to anyone else; the buck literally stopped with the Board, causing a reduction in the quantity and quality of school facilities which could be built. This contrasts with other cases, especially *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967 (10th Cir. 1980), cert. den. 101 U.S. 1417 (1981), relied upon by the State. See, J. Sosa's dissent in *Tiffany Const. Co. v. Bureau of Revenue,* 619 P.2d 1225, 1232-1233 (N.M. 1981).

In this sense the case involves far more than a tussle over money. Since school facilities are essential to education, (JA 73-78) New Mexico's tax adversely affects the physical environment in which learning at Ramah takes place and the consequent development of Indian children and their preparation for life. For this reason, fundamental interests of the Navajo Nation are at stake in this matter.

B. The Federal Government Has a Parallel Concern About Navajo Education, Indian Self-Determination In General And This School Construction Project in Particular.

Commencing in the late 1960s, the United States has been engaged in a vigorous program to improve Indian education. Among the essential means employed in that program is local community control of Indian schools.

When the State of New Mexico closed the old Ramah public high school in 1968, the Senate of the United States was engaged in a massive investigation of Indian education and its abuses.[8] Through a special subcommittee on Indian education, the Senate conducted field hearings for over two years and compiled seven volumes of hearing records. These records and the subsequent report of the subcommittee entitled "Indian Education: A National Tragedy - A National Conteporary Challenge" instantly became, and remain, the seminal documents in the field.[9] The report launched a decade of executive and congressional reform of Indian education, with Ramah serving in part as a model for the later actions. (Tr. 91, 92).

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8. Cf. *Natonabah v. Gallup-McKinley County School District*, 355 F.Supp. 716 (D.N.M. 1973). For history of Indian education see M. Szasz, *Education and the American Indian: The Road to Self-Determination 1928-1973*, Albuquerque; University of New Mexico Press (1974); and Gross, "Indian Self-Determination And Tribal Sovereignty: An Analysis of Recent Federal Indian Policy", 56 Texas Law Review 1195 (1978). In 1976, the Government Printing Office published a Compilation of Federal Laws Authorizing Education Assistance Explicitly For American Indians and Other Native Americans, No. 63-794.

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9. Senate Report No. 91-501, 91st Congress, 1st Session. This document is not part of the record but is a part of the legislative history for the Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203, January 4, 1975. See, e.g., Senate Report No. 93-682, 93rd Congress 2d Session, page 33.

The report contained truly startling findings regarding Indian education:

In July 1970, the President issued a formal Message to Congress on Indian Affairs.[10] In this Message, the President introduced the current Indian self-determination policy of

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- Drop out rates are twice the national average in both public and federal schools. Some school districts have dropout rates approaching 100 percent;
- Achievement levels of Indian children are 2 to 3 years below those of white students; and the Indian child falls progressively further behind the longer he stays in school;
- Only 1 percent of Indian children in elementary school have Indian teachers or principals;
- One-fourth of elementary and secondary school teachers - *by their own admission* - would prefer not to teach Indian children; and
- Indian children, more than any other minority group, believe themselves to be below average in intelligence. (emphasis original)

Report, *supra*, at IX.

The report went on to single out for criticism federal Indian boarding schools of the type to which Ramah Navajos were sent after the State closed the local public high school, calling them "custodial institutions at best, and repressive, penal institutions at worst.". *Ibid.* at 103.

Of the 60 recommendations made by the subcommittee to improve these conditions, the very first reads:

> That there be set a national policy committing the nation to achieving educational excellence for American Indians; to maximum participation and control by Indians in establishing Indian education programs; and to assuring sufficient Federal funds to carry these programs forward. Ibid., at 106.

The subcommittee also specifically recommended that the BIA contract with "nonprofit corporation(s) with an Indian board of directors" to carry out the goal of community school control, *Ibid.*, at 130, as was done with the Ramah Navajo School Board.

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10. 6 Weekly Comp. of Presidential Documents 1970, 894. This document is not part of the record but forms a part of the legislative history of Public Law 93-638, The Indian Self-Determination Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203. See, e.g., Senate Report No. 93-762, 93rd Cong., 2d Session, page 16.

which the Ramah Navajo School is a major and early manifestation. In addition to marking a major shift in Indian policy compared with the termination policy of the 1950s, the Message is noteworthy because it made an explicit connection between Indian self-government and educational reform for American Indians through community and tribal control of local schools. Said the President:

> One of the saddest aspects of Indian life in the United States is the low quality of Indian education. Drop-out rates for Indians are twice the national average and the average educational level for all Indians under Federal supervision is less than six school years. Again, at least a part of the problem stems from the fact that the Federal government is trying to do for Indians what many Indians could better do for themselves.
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> * * * * *
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> Fortunately, this condition is beginning to change. *The Ramah Navajo community of New Mexico* and the Rough Rock and Black Water Schools in Arizona are notable examples of schools which have recently been brought under local Indian control. Several other communities are now negotiating for similar arrangements. Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools. ***** (emphasis added)[11]

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11. Presidential Message, *supra* at 899.

There followed Congressional assistance to design and plan the Ramah Navajo School.

Then in 1975, Congress enacted Public Law 93-638, The Indian Self-Determination And Education Assistance Act, 88 Stat. 2203, 25 U.S.C. 450 *et. seq.*, relevant portions set out at JS 70. In this Act Congress codified the historic self-determination policy introduced through Executive action in 1970.[12] In its findings, Congress stated that "parental and community control of the educational process is of crucial importance to the Indian people"; and then declared as policy that Congress "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities. . . ." Congress concluded its declaration of policy by stating that:

> *(A) major national goal* of the United States is to provide *the quantity and quality* of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being. (emphasis added)

25 U.S.C. 450(b)(3), 450a(a) and 450a(c).

Congress' statement draws emphasis from the background of previous Federal actions regarding Indians. For many years the aim was to solve the Indian problem by

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12. One of the Act's chief purposes was to rationalize and streamline the "curious mixture of broad interpretation and unrelated statutes" which the Department of Interior had used "to improve the quality of educational and other services and to promote greater self-determination for Indian tribes". House Report No. 93-1600, 1974 U.S. Code Cong. and Adm. News 7782.

eliminating the Indians (in a political and cultural sense). The means used was the destruction of tribal institutions, a process called termination. Schools were a particular battleground as noted by the Special Senate Subcommitte. (App. to Br. A-9, A-10). The key point to have emerged through the years is recognition that quality Indian education can only be brought about if Indian parents, communities, and tribes are given the opportunity enjoyed by most Americans to control the education of their children in local schools. Outside control of Indian education just has not worked. (JA 72, 79). After many twists and turns, Federal policy is now firmly committed to reforming Indian education through Indian self-determination. Of course, a prerequisite for local Indian control of schools is physical space conducive to health and learning. (JA 73-78); *see,* 25 C.F.R. 31a.4(s), App. to Br. A-4). New Mexico's tax conflicts with this goal.

C. *Against These Vital Tribal And Federal Interests, The State of New Mexico Has Interposed Only General Money-Raising State Interests Which Do Not Justify This Tax.*

In contrast to the paramount commitments of both the Navajo Tribe and the United States to provide Indian children "the quantity and quality of educational services and opportunities" needed to achieve acceptable educational levels, the State of New Mexico interposes only its general interest in collecting revenue. Indeed, at trial, the State made no effort whatsoever to introduce evidence justifing its tax in relation to its ostensible taxpayer, Lembke, or any regulatory purpose and instead focused exclusively on alleged State benefits conferred, mostly indirectly and amorphously, on Ramah Navajos, a consideration that has never served to justify a tax of this

kind for reservation activities affecting Indian interests.[13] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, at 150 (1980); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976).

The only noteworthy point about the State's services to Ramah Navajos is that they do *not* include education for more than 90% of Ramah Navajo elementary and secondary school children. (JA 35). Despite its acknowledged State constitutional duty to provide educational services to State's children, (JA 47) the record shows that in 1968 New Mexico abandoned its only high school in the area, failed to provide access to any other public school for the vast majority of Ramah Navajo children (Tr. 178-179), *see*, findings in *Ben Jose, et. al. v. Gallup-McKinley Cty. Sch. Bd.* (JA 124).[14] and provides *no* State educational services including transportation, textbooks, or meals, to the Ramah Navajo

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13. For example, the State's witness attempted to show that Ramah Navajos derive a significant benefit from the New Mexico State Penitentiary located in Santa Fe. (JA 93, 100-101) She conceded however, that the State saves approximately $382,000 per year by not having to pay for education services to 450 Ramah Navajo children. (JA108) She also conceded that she had not taken into account Federal funds which the State receives for the provision of State services to New Mexico Indians (JA 95, 106); had not interviewed any Ramah Navajos (Tr. 306); had not accounted for the economic benefits to the State fisc from the yearly influx of Federal funds financing the operations of the Ramah Navajo School Board, which at the time of trial amounted to some $7,200,000 per year (Tr. 244; JA 100, 104); and was unable to determine that her assumptions as to who were Ramah Navajos were correct, having based her determinations on last names and zip codes. (JA 91, 99-100) In any case, the State conceded that its whole argument based on benefits to Ramah Navajos was irrelevant since this is not a due process case. (Tr. 353)

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14. When the State closed Ramah high school it failed to extend bus

School. (JA 51, 80, 85, 107; Tr. 238).

Under these circumstances it is unconscionable for New Mexico to attempt to justify its tax on the basis of services performed for Ramah Navajos. At best the State has a generalized interest in collecting revenue which cannot be compared with the fundamental interests of Navajo people to educate their children with the assistance of the United States as provided by treaty, statute, Presidential statement, tribal resolution, and specific Congressional appropriations. *White Mountain Apache Tribe,* 448 U.S., at 150.

This Court has repeatedly emphasized that State action intruding upon Indian interests can proceed only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams v. Lee,* 358 U.S. 217, 219 (1959). And *see, McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 179 (1973); and *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976).

Because education is perhaps the single most important function of tribal government, New Mexico's tax has unquestionably affected "essential tribal relations" and impeded Navajo self-government in this case. *Cf. Fisher v. District Ct.,* 424 U.S. 382 (1976).[15] Afterall, it is through

routes into the Ramah Navajo territory thus denying access to the nearest public high school, at Zuni, for most Ramah Navajo children. In doing so, the State flouted a State district court order. The State was able to escape the force of the order for the technical reason that it, as contrasted with its political subdivision the Gallup-McKinley County School District, was not a party. *Ben Jose v. Gallup-McKinley County School District,* 11th Judicial District, No. 12,913. (Ex. P-43, 181, 184; Ex. D-C, Tr. 186, JA 139).

15. Congress has recently legislated in the field of Indian child welfare, 92 Stat. 3069, 25 U.S.C. secs. 1901 *et. seq.*, further emphasizing the sensitive nature of this subject by protecting tribal interests in the custody of their children.

its children that the identity and character of a community are determined. *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972). By undermining a partnership between Congress and a remote Reservation Indian school board, the State's action here intrudes directly into essential tribal affairs in much the way it did in *Fisher.*

Where the burdens placed on tribal governmental activities are as plain, direct, unavoidable, and substantial as those here, the State's action cannot withstand scrutiny under *Williams v. Lee,* as a variety of other courts have held. See, e.g. *Crow Tribe v. Montana,* 650 F.2d 1104, cases cited at 1110 (9th Cir. 1981). In this case there is no question that State action "frustrates tribal self-government", *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 179 (1973), and therefore cannot be sustained.

II. NEW MEXICO'S TAX CONFLICTS WITH A PERVASIVE FEDERAL SCHEME TO IMPROVE INDIAN EDUCATION THROUGH THE CONSTRUCTION OF SCHOOL FACILITIES FOR RAMAH NAVAJO CHILDREN AND PROMOTE INDIAN SELF-DETERMINATION.

Quite apart from its effect on Navajo self-government, and in addition to it, the State tax in question here must be declared invalid because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

We submit that Indian education and school construction on reservations are subjects in which the Federal Government in a variety of ways over a period of many years has identified an interest that is so dominant and overriding

in importance as to completely prohibit New Mexico from engaging, without express authorization, in any activity which impedes, restricts, or burdens that interest. *White Mountain Apache Tribe,* 448 U.S. 136, 149 (1980).

The only express authorization which even remotely touches on the subject of this action is 25 U.S.C. 231, 45 Stat. 1185, as amended, 60 Stat. 962, which empowers States to undertake, with tribal and federal consent, enforcement of their compulsory school (not tax) laws on Indian lands to enhance the federal and tribal objective of educating Indians. In this case, it is plain that New Mexico's tax has nothing to do with enforcement of school laws under Section 231 and, most significantly, that the tax detracts from rather than enhances a joint tribal-federal educational objective.

A. *Indian Education On Reservations Is A Subject Entirely Taken In Hand By The Federal Government.*

We submit further that the Federal government's preemptive purpose is revealed in every single piece of legislation which it has enacted dealing with this subject as it affects reservation Indians. In addition to the history of Federal governmental involvement in Indian education, beginning with the Treaty of 1868, the following should be added:

In 1913, Congress enacted the Snyder Act, 25 U.S.C. 13, 42 Stat. 208, JS 77, granting the Bureau of Indian Affairs broad authority to provide education services to Indians. Approximately half the current budget of the Bureau of Indian Affairs is devoted to education.[16]

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16. E.g., Fy, 1978 Interior Appropriations Act, P.L. 95-74, 91 Stat. 285 and Senate Hearings, Dept. of the Interior and Related Agencies Appropriations, Fiscal Year 1975, 93rd Congress, Second Session, page 615.

In 1934, Congress enacted the Johnson O'Malley Act, 25 U.S.C. 452, 48 Stat. 596, as amended, 49 Stat. 1458, JS 12, to provide authority for the BIA to enter into contracts with a wide variety of entities including private corporations for provision of education services to Indians. It was this law which served as authority for the first contracts for operation of a school by the Ramah Navajo School Board until passage of the Indian Self-Determination Act. (JA 41, 47, 51).

In 1950, Congress enacted the Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et. seq.*, 64 Stat. 44, as amended, 72 Stat. 834. Among the purposes of this Act was to furnish "school buildings and equipment, and other educational measures" for the two tribes.

In 1972, based on the recommendations of the Special Senate Subcommittee on Indian Education and the President's Message to Congress, 6 Weekly Comp. of Presidential Documents 1970, page 894, Congress enacted the first of the Indian education reforms of the 1970s, an Act called The Indian Education Act, Public Law 92-318, Title IV, 86 Stat. 334, 20 U.S.C. 887c, a statute recognizing the importance of parental and community involvement in the educational process.

Then in 1975 Congress enacted The Indian Self-Determination And Education Assistance Act giving Indian tribes and tribal organizations the right to operate major social and educational programs previously operated for them by the Federal government.

Lastly, Congress has continued its drive for Indian educational reform by enacting in 1978 still another statute, The Indian Basic Education Act, Title XI of Public Law 95-561, 25 U.S.C. 2001 *et. seq.* 20 U.S.C. 241aa-241ff, 887c-1, 887c-2, 1221h, 92 Stat. 2312, as amended, 93 Stat. 341. This statute, like the Indian Self-Determination Act, con-

tains specific provisions regarding school construction, evidences a concern that the facilities used for educating Indians be safe and adequate, and restates Congress' policy of local Indian school control.[17] With passage of this Act, Congress has enacted into law almost all of the major recommendations of the Special Senate Subcommittee on Indian Education made less than ten years before.

Together with Congress' stated concern with improving Indian education through community control of schools, 25 U.S.C. 450, 450a, this history of related Federal laws leaves absolutely no doubt that the Federal involvement in Indian, especially Navajo, education and self-determination is fundamental, broad, and pervasive.

B. *The Federal Regulations Covering This Project Are As Preemptive As Those In* White Mountain Apache Tribe v. Bracker, *448 U.S. 136 (1980).*

Under the various Congressional directives just reviewed, the Executive Branch has constructed an intricate regulatory system designed to promote Indian self-determination and educational improvement. Some of these regulations are:

1. *25 C.F.R. Part 271*, Nov. 4, 1975 (App. to Br. A-1; JS 78). This part, consisting of some eighty-four provisions, implements the contracting directive in 25 U.S.C. 450f of the Indian Self-Determination Act. Under this provision, the Ramah Navajo School Board has contracted for operation of its school since passage of the Act. (JA 32-33). The regulations define Indian education as a "tribal governmental function", 25 C.F.R. 271.1(q), and characterize school boards such as Ramah as "tribal organizations", 25 C.F.R. 271.2(r). (JS 80). These regulations assume that the funds to be used by tribal organizations will be Federal.

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17. 25 U.S.C. 2005, 25 U.S.C. 458, 25 U.S.C. 2010.

2. *25 C.F.R. Part 274,* Nov. 4, 1975 (App. to Br. A-1 to A-4, JS 81). This part governs school construction contracts or services for tribally-operated previously private schools under 25 U.S.C. 458, JS 73. The Ramah Navajo School Board falls within the definition of "previously private school", 25 C.F.R. 274.3(n). And see 25 C.F.R. 274.3(r).

A specific provision of these construction regulations empowers tribal organizations such as the Ramah Navajo School Board to contract to build an entire school itself under the Indian Self-Determination Act and subcontract with companies such as Lembke to handle the actual construction work, 25 C.F.R. 274.24, (App. to Br. A-2),[18] thus showing that the Federal agency involved, the Interior Department, contemplates Indian community involvement in construction of school facilities.

3. *25 C.F.R. Part 31a, Oct. 9, 1979* (App. to Br. A-3, A-4; JS 83). This part codifies the Indian education policies of the United States. Most had been articulated in one form

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18. The regulations surrounding Indian on-reservation school construction by "previously private schools" are as detailed and inclusive as those relating to reservation forest products or Indian trading. *White Mountain; Central Machinery Co; Warren Trading Post Co.* See e.g., 25 C.F.R. 274.24(a); 25 C.F.R. 274.46; 41 C.F.R. 14H-70. 632, 803 and 804. (App. to Br. A-2 to A-7). Construction of Phase I on the Ramah School began several months prior to November 4, 1975, the effective date of these construction regulations (Ex. P-34, Tr. 38); However, the BIA had contractually applied their substance to the Ramah School project even prior to November 1975. (Ex. P-29, Tr. 38, JA 120; Ex. P-30, Tr. 38.)

The BIA-Ramah and Ramah-Lembke contracts for Phases II and III of this school project (covering two-thirds of construction) were let after November 4, 1975. (Exs. P-31, P-32, P-35, P-36, all at Tr. 38 by Stip.)

or another for several years.[19] This codification includes policies guaranteeing Indian children schooling as close to home as possible (Section 31a.4(p), day schooling where desired (Section 31a.4(i), and adequate school facilities (Section 31a.4(s).

This sampling of applicable rules governing tribal contracting of BIA education and school construction programs certainly demonstrates the existence of policies for the improvement of Indian education, including construction of schools, as inclusive in intent and therefore as preemptive as were the regulations for the promotion of forest products enterprises on reservations in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

New Mexico's tax has clearly interfered with the purposes of each of these numerous statutes and regulations. By diverting a significant portion of funds available for construction, the tax has conflicted with Congress' intentions in its direct appropriations to the Ramah Navajo School Board, as well as with the broad programs and policies which they are a part.[20]

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19. E.g., Footnote 11

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20. The State has argued that these appropriations contain no express exemption from the tax at issue here (Motion 7). However, no express prohibition is needed:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law**** We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of Federal law, an express congressional statement to that effect is required.

White Mountain Apache Tribe v. Bracker, 448 U.S., at 143-144, and see 448 U.S., 150-151; *McClanahan v. Arizona State Tax Comm'n,* 411

In short, New Mexico's tax has "disturbed and disarranged" a specific statutory plan for Indian educational improvement devised by Congress in cooperation with the Ramah Navajo School Board. *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 691 (1965); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 152 (1980). The tax threatens the evident Congressional purpose to promote better Indian education through self-determination and its specific plan for the Ramah Navajos by reducing the quantity and quality of educational resources available to them, and should be stricken.

III. NEW MEXICO'S TAX ALSO CONFLICTS WITH A COMPREHENSIVE FEDERAL SCHEME REGULATING THE SALE OF GOODS AND SERVICES ON THE NAVAJO RESERVATION.

In addition to its conflict with Federal laws to improve Indian education and Navajo self-government, the New Mexico gross receipts tax in this case also conflicts with the Federal Indian trader statutes as applied to the Navajo Reservation. 25 U.S.C. 261-264, 19 Stat. 200, 22 Stat. 179, 31 Stat. 1066, 32 Stat. 1009, JS 13-14, App. to Br. A-10, A-11.

In prior cases these statutes have been found preemptive of state sales taxes or transaction privilege taxes when applied to non-Indian businessmen engaged in business activities on reservations. In *Warren Trading Post Co. v.*

U.S. 164, 174 (1973); *Bryan v. Itasca County,* 426 U.S. 373, 379, 392-393 (1976). In any event, the New Mexico Enabling Act and Constitutional Disclaimer of jurisdiction over Indian lands, 36 Stat. 558-559, sec. 2(B), N.M. Const., Art. XXI, sec. 2, provides an express prohibition, see *infra,* pages 38 - 39.

Arizona Tax Comm'n. 380 U.S. 685 (1965), the same kind of tax as here and the same reservtion were involved. The Court ruled that the trader statutes are evidence "that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders", *Warren, supra,* 380 U.S., at 690, and that the statutes thus preclude assessment of the tax on the gross receipts of a licensed trader on the Navajo Reservation.

In *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980), Arizona's transaction privilege tax was imposed on a non-Indian, unlicensed, off-reservation farm equipment salesman who had made an on-reservation sale of farm equipment to an Indian tribal enterprise. The Court applied the *Warren Trading Post* rule to that case, holding that "it is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations." *Central Machinery Co., supra,* 448 U.S., at 165.

The State would distinguish these cases on the grounds that construction is a "service" and that the trader statutes only apply to sales of goods. (Motion 9). It claims that "multi-million dollar construction contracts" are somehow exempted from the purview of those statutes. Of course, these statutes have been law for some time and were drafted in an era when business activities on Indian reservations were referred to as "trading". However, nothing in the statutes' language or history restricts their meaning to dealings in trinkets. It would be a strained interpretation indeed to read the terms "trader" and "trade" in a restrictive way by excluding those business activities by non-Indians on reservations, such as large-scale construction projects, that have the most economic impact, especially since 25 U.S.C.

262, enacted several years after Section 261, is not restricted to "goods".

Moreover, the Bureau of Indian Affairs has construed the Indian trader statutes to apply to sales of both goods and *services* on the Navajo Reservation, 25 C.F.R. Part 252, JS 86-87, and elsewhere. Cf. *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967 (10th Cir. 1980), cert. den., 101 S.Ct. 1417 (1981), in which the BIA had licensed building contractors under 25 C.F.R. Part 251.

The State's attempt to exclude construction "services" from the purview of the trader statutes, citing *Mescalero Apache Tribe v. O'Cheskey,* thus fails for an elementary reason. The trader regulations applicable to the Mescalero Reservation, 25 C.F.R. Part 251, are not the same as those applicable to the Navajo Reservation, 25 C.F.R. Part 252. In contrast with Part 251, Part 252 expressly covers sales of services as well as goods, 25 C.F.R. 252.3(1), JS 87.

Lembke's construction activities at Ramah unquestionably constitute a "reservation business" within the meaning of that term in the regulation. The Pine Hill construction site of the new school constitutes a "fixed location" within the reservation, and the activity performed by Lembke involves the sale of both goods and services. In consequence, the licensing requirement of 25 C.F.R. 252.5(a) applies to Lembke just as its counterpart did to the unlicensed salesman in *Central Machinery* and the licensed trader in *Warren Trading Post.* Therefore, the attendant interference with the comprehensive Federal trader licensing scheme created by New Mexico's tax is comparable.

Part 252 is noticeably more stringent and broader than those in Part 251 because the Navajo regulations derive from a judgment against the Bureau of Indian Affairs awarded to individual Navajos and the class they represented. *Rockbridge v. Lincoln,* 449 F.2d 567 (9th Cir.

1971). That action involved a claim that the Secretary of Interior had not properly implemented the trader statutes on the Navajo Reservation. After the decision by the Ninth Circuit, the Secretary promulgated the present regulations, 40 Federal Register 39835, August 29, 1975.[21]

If a State tax on a single transaction by an unlicensed, off-reservation-based, non-Indian equipment salesman involving an approved sale to Indians on a reservation is preempted by the less restrictive non-Navajo trader regulations, then a similar tax imposed on proceeds from a multi-million dollar, multi-phase construction project carried on over five years at a fixed site on the Navajo Reservation by a non-Indian, unlicensed contractor hired with BIA concurrence (Exs. P-29, P-30, P-31, P-32, all at Tr. 38; JA 42-43, 120; App. to Br. A-2 to A-7) and subject to BIA control (Ex. P-29, Tr. 38, JA 120) is also preempted.

IV. THE RULE IN *McCLANAHAN V. ARIZONA STATE TAX COMM'N,* 411 U.S. 164 (1973), INDEPENDENTLY BARS NEW MEXICO'S TAX IN THIS CASE.

In *McClanahan, supra,* at 171, 181, this Court invalidated an Arizona personal income tax levied on a Navajo living and deriving her income on the Navajo Reservation because the tax conflicted with the principle that States may not exercise jurisdiction over Indians or Indian property on Indian reservations without express congressional authorization. Since *McClanahan* was decided, the Court has applied the same principle in *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), voiding a Montana property tax on motor vehicles owned by reservation Indians; in *Bryan v. Itasca County,* 426 U.S. 373 (1976), strik-

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21. The case implicitly held that the trader statutes do cover "services" on the Navajo Reservation, a ruling which pre-dates the Ramah School construction project by several years. 449 F 2d 567 (9th Cir. 1971).

ing down a Minnesota property tax on a mobile home owned by a reservation Indian in a P.L. 280 state; and in *Washington v. Conf. Tribes of Colville Res.*, 447 U.S. 134 (1980), invalidating Washington's property tax (labeled an excise tax) on reservation Indian-owned motor vehicles.

The *McClanahan* principle has not yet been applied to void a State tax, such as New Mexico's, whose legal incidence nominally falls on a non-Indian. However, in this case the facts clearly establish that New Mexico's gross receipts tax operates as a direct and unavoidable burden on reservation Indians as consumers of construction work, rendering the State's characterization of the legal incidence of its tax completely misleading. In Indian tax cases, this Court has always been quick to pierce legal fictions and reject State or Tribal tax characterizations which conflict with economic reality. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 (1980); *Washington v. Conf. Tribes, supra*, 447 U.S., at 163-164; *Moe v. Salish and Kootenai Tribes, supra*, 425 U.S., at 481-482; and *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), where the rule applicable to Indian cases was expressly laid down:

> Where a federal right is concerned we are not bound by the characterizations given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal rights asserted.

Whatever the efficacy of "legal incidence" analysis in other contexts, the term operates as a fictional label where a consumer, such as this Navajo Board, must accept the true incidence of the tax and is not able to pass on the burden to anyone else.[22] Thus, New Mexico's reliance on non-Indian

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22. See Justice Dan Sosa's dissent in *Tiffany Construction Co. v. Bureau of Revenue*, 619 P.2d 1225, 1232-1233 (N.M. 1981) on remand, a case involving New Mexico's gross receipts tax imposed on a foreign, non-

sellers of goods and services to collect the tax from Indians in this case for payment to the State should not cloud the underlying actuality that it is the Ramah Navajo School Board and its children who were forced to absorb this tax by sacrificing school facilities.

Where in cases such as this the non-Indian party's involvement is merely nominal, serving only as a conduit from the Indian party to the State, and where an admittedly sovereign function of an Indian tribe is unavoidably

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Indian contractor for road work wholly within the Navajo Reservation involving no other contacts with the State of New Mexico. The Senior Justice took exception to the majority's reliance on *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), cert. den., ____ U.S. ____ (1981), in rejecting Tiffany's claims once again, by saying:

> The majority here upholds the State tax because it is a tax which falls directly upon the contractor and only indirectly upon the tribe. They cite *Mescalero* for the proposition that an indirect tax on Indians is permissible, but fail to recognize that the indirect tax in *Mescalero* could be "passed on as the Tribe engages in its resort and other business" (625 F. 2d at 972), whereas the tax in this case cannot be passed on to anyone except the tribe itself. This, then, is the key distinction between the *Mescalero* case and this case since the Tenth Circuit Court of Appeals repeatedly emphasized the fact that the tax could be passed on to the consumer. In addition, the construction of a resort complex is in the nature of a proprietary project of the Tribe for tourist consumption, whereas a road is in the nature of a public or governmental function which provides an essential service to the Tribe.

Tiffany Const. Co. v. Bureau of Revenue, on remand, 629 P.2d 1225, 1232-1233 (N.M. 1981).

At least one court has recently held that state taxation of non-Indians engaged in commercial ventures on Indian reservations under contract to tribes may impermissibly impair tribal self-government in violation of the rule in *Williams v. Lee*, 358 U.S. 217 (1959), even where the tribal/non-Indian venture is pecuniary or proprietary in nature. *Crow Tribe of Indians v. State of Montana*, 650 F. 2d 1104, 1115-1117 (9th Cir. 1981).

burdened by the tax, the strictures against State taxation of reservation Indians or property, *McClanahan, supra,* 411 U.S., at 171, 181; *Bryan v. Itasca County, supra,* 426 U.S., at 376 and note 2, cannot be overcome by "mere nomenclature". *Washington v. Conf. Tribes, supra,* 447 U.S., at 164.

This Court has already recognized that a transaction privilege tax of the kind assessed here when imposed on reservation activities operates as a direct tax on Indians, *McClanahan, supra,* 411 U.S., at 174-175:

> . . . . It cannot be doubted that the reservation lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. *It is thus unsurprising that this Court has interpreted the Navajo Treaty to preclude extension of state law - including state tax law - to Indians on the Navajo Reservation.* See *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S., at 687, 690; *Williams v. Lee, supra,* at 221-222. (emphasis added)

Warren, of course, involved imposition of a state gross receipts tax exactly comparable to New Mexico's upon a non-Indian trader on the Navajo Reservation. By citing *Warren,* therefore, as authority for the proposition that states may not tax Indians on the Navajo Reservation, the Court indicated that gross receipts taxes are to be considered taxes on consumers, just as it did in *Mescalero v. Jones,* 411 U.S. 145, 146 (1973), when it referred to New Mexico's gross receipts tax as a "sales tax".

In *Moe, supra,* at 482-483, the Court upheld a "minimal burden" imposed by a state tax law on reservation Indian sellers of cigarettes to non-Indian purchasers upon whom the tax was levied. Here too a State has identified the seller

as that person in a commercial transaction from whom the State can most easily collect its tax. In *Moe,* the seller was an Indian. In this case it is a non-Indian company. In *Moe,* the State imposed legal duties on the seller (to collect the tax) and on the purchaser (to pay it). In this case, the true economic effects are masked by New Mexico's declaration that the legal incidence of its gross receipts tax falls on the seller, even though there is no serious dispute that the tax is passed on to consumers. New Mexico, unlike Montana, relies on economic laws instead of its own statute to place the burden on consumers.

In *Moe* the Court decided the issue on the basis of economic effect, going so far as to state that the Indian seller's obligations did not truly constitute a tax. *Moe, supra,* 425 U.S., at 482-483. The same practical reasoning should apply here. However, because the ultimate (and substantial) economic burden in this case falls exclusively on a reservation Indian school board and its children, *Moe* dictates a ruling forbidding New Mexico's action.

This conclusion receives support from yet another Federal statute. The New Mexico Enabling Act, 36 Stat. 558-559, sec. 2(B), reproduced in the New Mexico Constitution, Art. XXI, sec. 2, set out at JS 75, contains a disclaimer of jurisdiction over Indian lands plus this specific reference to State taxes:

> Nothing herein provided for shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property *outside of an Indian reservation* owned or held by any Indian. . . . (emphasis added)

In *McClanahan, supra,* 411 U.S., at 176, the Court relied in part on the comparable wording of the Arizona disclaimer for its holding. In so doing the Court rejected contentions that the Buck Act, 4 U.S.C. secs. 104 *et. seq.*, conferred the

right to tax on Arizona and that the income tax was somehow not a tax on lands or property of an Indian. In this case, it must be remembered, New Mexico made *no* effort to justify its tax on the basis of services to Lembke or any regulatory objective. It focused solely on Ramah Navajos — over whom it has no jurisdiction.

New Mexico's tax has reduced the "quantity and quality" of school facilities available to Navajo children on Navajo lands, 25 U.S.C. 450a(c). It has thus reduced the uses of real property on an Indian reservation. Its action is therefore barred absent express authorization from Congress, which does not exist. *McClanahan, supra,* 411 U.S. at 171; *United States v. Mitchell,* 100 S.Ct. 1349 (1980); *United States v. Rickert,* 188 U.S. 432 (1903). And see 25 U.S.C. 478b, 49 Stat. 378 (App. to Br. A-11), which safeguards the Navajos' rights, including tax exemptions, existing prior to passage of the Indian Reorganization Act. In the circumstances presented here, New Mexico's tax has operated as a direct tax on Indians or Indian property and is barred under long-established principles of Federal Indian law.

CONCLUSION

For the foregoing reasons, Appellants pray for an order reversing the decision below and remanding with instructions that the court below enter judgment for Appellants with explicit directions that the Appellee Bureau of Revenue be ordered to refund, with interest from date of assessment, the taxes which have been illegally collected,

and for such other and further relief as the Court deems appropriate.

Respectfully submitted:

MICHAEL P. GROSS
Carl Bryant Rogers
ROTH, VANAMBERG AND GROSS
P. O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988 8979

Counsel for Appellants,
Ramah Navajo School Board, Inc.
and Lembke Construction Co., Inc.

Of Counsel:
Neal A. Jackson
Sanford, Adams, McCullough and Beard
1156 Fifteenth Street, N.W.
Washington, D.C. 20005

January 1982.

IN THE DISTRICT COURT OF NEW MEXICO,
FIRST JUDICIAL DISTRICT

No. 78-438(C)

Relevant Portions of 25 C.F.R. Parts 271 and 274

25 C.F.R. § 271.2

* * * *

(q) "Tribal governmental function" means all programs authorized to be administered by the Bureau for the benefit of Indians enumerated as line items in the Bureau's annual budget requests under the Activities of Education and Indian Services, the Subactivities of Direct Employment and Road Maintenance, and those programs related to Irrigation and Power Operation and Maintenance identified as a part of the subactivity minerals, mining, irrigation and power under the Activity of Tribal Resources Development.

(r) "Tribal organization" means the recognized governing body of any Indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; *Provided,* That a request for a contract must be made by the tribe that will receive services under the contract; *Provided further,* That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract.

* * * *

25 C.F.R. § 274.3

* * * *

(m) "Minimum school facilities" means classroom and auxiliary rooms and initial equipment necessary to operate an approved educational program for the membership of the school at normal capacity in accordance with criteria established by the Bureau.

(n) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau), that is operated primarily for Indian students from age 3 years through grade(s) 12; and, which at the time of application is controlled, sanctioned, or chartered by the governing body(s) of an Indian tribe(s).

* * * *

25 C.F.R. § 274.24 Performing construction work.

When a project has been placed on the commitment-to-fund listing, the applicant will be given the following options, subject to approval by the requesting tribe(s):

(a) To negotiate a contract with the Bureau to perform all of the work or part of the work needed for the project with the Bureau performing the rest. Such contracts shall comply with the requirements in Subpart C of this Part and with 41 CFR Part 14H-70.

25 C.F.R. § 274.26 Funding provisions.

(a) No funds from any contract under this Part shall be made available by the Bureau directly to other than Indian tribes and tribal organizations. However, Indian tribes and tribal organizations assisted under this Part may use funds provided to subcontract for necessary services.

(b) Twenty-five (25) per cent of all funds appropriated under Title II, Part B, section 204 of the Act shall be expended for construction of previously private schools controlled and managed by a tribal organization. Any

unobligated funds will be retained until completion of the project and unexpended funds returned to the Bureau. Projects which are partially funded shall be given first consideration for the additional funding necessary to complete such projects.

25 C.F.R. § 274.33 Facilities construction.

(a) The Commissioner may assist in preconstruction and construction activities to assure conformity with the requirements of the Act. Approval of all proposed preconstruction documents will be obtained from the Commissioner. Assistance prior to the preparation of these and similar documents will be provided, upon request, by the Commissioner or his representative. A preliminary conference may be suggested with the project architect and others if that seems desirable. The Commissioner will provide sufficient copies of all forms used to prepare the documents rquired for the project.

* * * *

25 C.F.R. § 274.6 Applicable procurement regulations.

41 CFR Part 14H-70 provides the contract clauses which shall be included in contracts made with tribal organizations under this part and places some requirements on them in addition to those given in this Subpart.

25 C.F.R. § 31a.4

* * * *

(i) Choice of school. Afford Indian and Alaska Native students the opportunity to attend local day schools and other schools of choice and the option to attend boarding schools when the student and parent or guardian determine

it is in the student's best interest and consistent with the provisions of the Indian Child Welfare Act of 1978 (Pub. L. 95-608) except that, residential schools shall not be used as substitutes for providing adequate local family social services. Each school shall establish its attendance area in cooperation with neighboring schools.

* * * *

(p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native student's home as possible, except when a student elects to attend a school elsewhere for specialized curricular offerings or services.

* * * *

(s) *Planning, maintenance and use of facilities.* (1) Ensure that the needs of the students and Tribal or Alaska Native community will receive first priority in the planning, design, construction, operation and maintenance of Bureau schools and residential facilities, rather than other considerations, such as ease of maintenance, and that these facilities assure a supportive environment for learning, living and recreation.

* * * *

41 C.F.R. 14H-70.632 Subcontractor cost and pricing data.

The following clause should be included in all contracts, when the subcontracts of the type and size described herein are contemplated.

SUBCONTRACTOR COST AND PRICING DATA

(a) The contractor shall require subcontractors hereunder to submit in writing cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursed type, time and material, labor-hour, incentive, or price determinable

subcontract the price of which is expected to exceed $100,000; and

(2) Prior to the award of any other subcontract, the price of which is expected to exceed $100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public or prices set by law or regulation.

(b) The contractor shall require subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (a) above are accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract change or modification.

(c) The contractor shall insert the substance of this clause including this paragraph (c) in each of his cost-reimbursement type, time and material, labor-hour, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceed $100,000 unless the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder which exceed $100,000, the contractor shall insert the substance of the following clause:

SUBCONTRACTOR COST AND PRICING DATA — PRICING ADJUSTMENTS

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this con-

tract which involves a price adjustment in excess of $100,000. The requirements of this clause shall be limited to such price adjustments.

(b) The contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances:

(a) Prior to award of any cost-reimbursement type, time and material, labor-hour, incentive, or price redeterminable subcontract, the price of which is expected to exceed $100,000; and —

(2) Prior to award of any other subcontract, the price of which is expected to exceed $100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The contractor shall require subcontractors to certify, in substantially the same form as that used in the Certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (b) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated price of the contract modification.

(d) The contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds $100,000.

41 C.F.R. § 14H-70.803 Performance bonds.

(a) Performance bonds will not be required from an Indian tribe or Indian organization serving as a governmental instrumentality or an Indian tribe; *Provided,* That such

tribe or tribal organization shall require any subcontractor performing work under the contract to provide a performance bond in the amount and manner set forth in § 1-10.104-1 of this title.

(b) The clause to be included in construction contracts with Indian tribes and Indian organizations relative to performance bonds is set forth in § 14H-70.621.

41 C.F.R. § 14H-70.804 Payment bonds.

(a) Payment bonds will not be required from an Indian tribe or Indian organization serving as a governmental instrumentality of an Indian tribe; However, such tribe or tribal organization shall require any subcontractor performing work under the contract to provide a payment bond in the amount and manner set forth in § 1-10.105-1 of this title.

(b) The clause to be included in construction contracts with Indian tribes and Indian organizations relative to payment bonds is set forth in § 14H-70.621.

Excerpts from Ex. P-1(a), Title 10, Navajo Tribal code, (Tr. 38)

"The value attached to home living with school attendance on a day basis remains a primary objective of tribal and Bureau policy." Res. No. CAU-43-61, Aug. 29, 1961; T. 10, prec. Sec. 1, NTC.

* * * *

"The Navajo Tribe is committed to the continuous improvement in the quality of education available to the

Navajo people." Res. CAU-87-69 (authorizing Chapters to establish local Navajo community school boards), Aug. 8, 1969, T. 10, sec. 51 N.T.C.

* * * *

"Statement of aims and objectives of the Navajo Local Community School Board Program. . . .

1. To seek maximum involvement of parents and Tribal leaders in the education program." *Ibid.*

* * * *

"The Navajo Tribal Council has given full support and cooperation to accomplishment of the objectives of the Navajo education programs and maintains a deep and active interest in the education of all Navajo children . . ." Res. CO-38-55, Oct. 13, 1955, T. 10, Sec. 101, N.T.C.

* * * *

"The Navajo Tribe, recognizing that the future well-being of its members is dependent upon adequate and readily available opportunities for education, desires to encourage the construction and operation of schools at all places in the Navajo country where there are sufficient numbers of children. . . ." (withdrawing land for school sites) Res. CN-76-53, _____, 1953, and Res. CJ-37-58, sec. 1, July 21, 1958, T. 10, sec. 421-422, N.T.C.

* * * *

"The failure to provide schools and teachers as specified in the Treaty of 1868 has visited the greatest hardship upon the adult population of Navajos who lost the opportunity in their younger years to acquire even elementary education."

A-9

Res. CF-12-61, Feb. 14, 1961, T. 10, sec. 461, N.T.C.

* * * *

The Special Senate Subcommittee on Indian Education made these findings:

I. **POLICY FAILURE**

The dominant policy of the Federal Government towards the American Indian has been one of coercive assimilation. The policy has resulted in:

A. The destruction and disorganization of Indian communities and individuals.

B. A desperately severe and self-perpetuating cycle of poverty for most Indians.

C. The growth of a large, ineffective, and self-perpetuating bureaucracy which retards the elimination of Indian poverty.

D. A waste of Federal appropriations.

II. **NATIONAL ATTITUDES**

The coercive assimilation policy has had a strong negative influence on national attitudes. It has resulted in:

A. A national that is massively uninformed and misinformed about the American Indian, and his past and present.

B. Prejudice, racial intolerance, and discrimination towards Indians far more widespread and serious than generally recognized.

III. **EDUCATION FAILURE**

The coercive assimilation policy has had disastrous effects on the education of Indian children. It has resulted in:

A. The classroom and the school becoming a kind of

battleground where the Indian child attempts to protect his integrity and identity as an individual by defeating the purposes of the school.

B. Schools which fail to understand or adapt to, and in fact often denigrate, cultural differences.

C. Schools which blame their own failures on the Indian student and reinforce his defensiveness.

D. Schools which fail to recognize the importance and validity of the Indian community. The community and child retaliate by treating the school as an alien institution.

E. A dismal record of absenteesim, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children.

F. A perpetuation of the cycle of poverty which under-mines the success of all other Federal programs.

IV. **CAUSES OF THE POLICY FAILURE**

The coercive assimilation policy has two primary historical roots:

A. A continuous desire to exploit, and expropriate, Indian land and physical resources.

B. A self-righteous intolerance of tribal communities and cultural differences.

Senate Report No. 91-501, 91st Congress, 1st Session, page 21. (emphasis in original)

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25 U.S.C. § 263.

The President is authorized, whenever in his opinion the public interest may requre the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all ap-

plications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

25 U.S.C. § 264.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilzed Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

25 U.S.C. § 478b.

All laws, general and special, and treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application said sections.

Office - Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2162

IN THE

Supreme Court of the United States

October Term, 1981

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee.

On Appeal From The Court of Appeals of New Mexico

BRIEF OF THE STATE OF NEW MEXICO

Jeff Bingaman
Attorney General of New Mexico

JAN UNNA
Special Assistant Attorney General
123 West Palace Avenue
Santa Fe, New Mexico 87501
(505) 988-7577

Gerald B. Richardson
Assistant Attorney General
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

Attorneys for Appellee

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QUESTIONS PRESENTED

1. Whether the Court should expressly apply the long-established "legal incidence" test, fashioned to deal with state tax threats to the sovereignty of the United States, to tribal claims that state taxes on non-Indians violate Indian sovereignty.

2. Whether New Mexico's gross receipts tax levied on a non-Indian general contractor's construction receipts from building a school for a school board on the Ramah Navajo Reservation, when the general contractor does business throughout New Mexico and when the school construction is accomplished solely by federal funds without the use of any Navajo Tribal funds, "infringes on the right of the Navajo Tribe to govern itself."

3. Whether the federal government has preempted New Mexico's gross receipts tax on a non-Indian general contractor, where the BIA approved of construction contracts which included the tax as a project cost and where Congress appropriated the construction funds based on construction budget estimates that included the tax as a project cost.

4. Whether the Indian trader licensing statutes, regulating the kind and quality of goods that a reservation Indian trader may sell to Indians, preempt New Mexico gross receipts tax on receipts from performing a construction service.

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BRIEF OF THE STATE OF NEW MEXICO

STATUTES INVOLVED

Pertinent provisions of New Mexico's Gross Receipts and Compensating Tax Act NMSA 1978, §§7-9-2, 7-9-3, 7-9-4, 7-9-51 and 7-9-52 are set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

This appeal raises the issue of whether a state may be blocked from levying a non-discriminatory privilege tax on a general contractor who is not Indian, when he does business on a reservation. The tax is New Mexico's gross receipts tax, §§7-9-1 *et seq.*,

NMSA 1978, the same one involved in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991, *cert. den.* 101 S.Ct. 1417 (No. 80-812, February 23, 1981), and in *United States v. State of New Mexico*, 624 F.2d 111 (10 Cir. 1980), *cert. gr.* No. 80-702 (February 23, 1981; arg. December 8, 1981).

The legal incidence of the New Mexico gross receipts tax is on the seller of services, even though the economic burden may by contract pass to the buyer. *United States v. State of New Mexico*, 581 F.2d 803 (10 Cir. 1978); *United States v. State of New Mexico*, No. 10-702, Brief for U.S., 25-26. In rejecting a claim that the legal incidence of the New Mexico tax is on the United States as buyer, Judge McKay described New Mexico's gross receipts statute as follows:

> The Act specifically makes the gross receipts tax applicable to the doing of business in New Mexico without reference to whether that business is with the United States and, with uniformly applied exceptions, assesses the tax upon anyone receiving compensation. There is no evidence that the tax interferes with the performance of federal functions. The tax is not directly imposed on the United States and, although the contractors pass the tax on to the United States they are not required by the Act to do so.
>
> 581 F.2d at 806.

The gross receipts statute broadly taxes receipts from not only the sale of tangibles, but from the sale of services as well, §7-9-3F NMSA 1978. Construction activities, such as Lembke's, are taxed as a service, §7-9-3K NMSA 1978 (App. D), and at trial it was conceded that Lembke's business is rendering construction services. I Tr. Pr. 163.

Lembke Construction Co., Inc. ("Lembke") is the taxpayer in this case. JA 22, 33. It is a New Mexico corporation doing business as a general building contractor, so licensed by the

State of New Mexico, and engaged in business state-wide. JA 57-58; Tr. Pr. 14, 129; Tr. R. 393. At the time it was building the Board's facilities for the Ramah Navajo School Board, Inc. (the "Board"), it was also under contract with the City of Albuquerque to construct a courts facility in downtown Albuquerque for $3.2 million, Tr. R. 393, and it had numerous subcontracts and material supply contracts on that job. Tr. R. 414-426. It is headquartered in Albuquerque, JA 58, Tr. Pr. 129, and its primary business focus is on commercial structures. *Ibid.*

Within New Mexico's borders are dozens of Indian tribes and pueblos. As of 1970, the Indians of New Mexico numbered approximately 73,000, and they beneficially own 6,822,906 acres of land within the state. Taylor, *The States and Their Indian Citizens*, U.S. Dept. Interior, BIA, 1972, p. 176 ("Taylor"). Indian economic and cultural development in this state is quickening; as it grows it becomes inextricably tied to the non-Indian economy of the region. Uranium and coal mining operations take those minerals from Navajo lands in western New Mexico. International oil and gas producers drill on the Jicarilla Apache Reservation in northern New Mexico. *Merrion v. Jicarilla Apache Tribe*, __U.S.__ (Nos. 80-11, 80-15, January 25, 1982). Texans ski and relax at the Mescalero Apache Tribe's Sierra Blanca ski resort, *Mescalero Apache Tribe v. Jones, supra*, and the Inn of the Mountain Gods, *Mescalero Apache Tribe v. O'Cheskey, supra*, in the south central part of the state. The all-Indian Pueblo Cultural Center is on 11.6 acres of Indian land near downtown Albuquerque. P.L. 95-232, 92 Stat. 31 (February 17, 1978).

The Ramah Navajo Reservation in west central New Mexico, where Lembke constructed the schools for the Board, is physically separated from the main Navajo Reservation in northwest New Mexico and northeast Arizona. The Ramah Navajos constitute one of three satellite Navajo Reservations in New Mexico, located approximately 50 miles southeast of Gallup. JA 32.

They are citizens of the United States and New Mexico, 8 U.S.C. §1401(a)(2), and are entitled to vote in state[1] and local[2] elections. They number approximately 1,400. JA 93. Despite their geographic isolation from the seat of state government, they have been the recipients of a substantial amount of state services, both direct and indirect, including public and higher education, tax and welfare benefits. They received a total of $390,000 in benefits from the state in 1977 alone, JA 87-94, for an expenditure of $280 per capita. The total benefits figure is substantially smaller than the total state expenditures for all Navajo Indians, because the Ramah Band is only a tiny fraction of the total New Mexico Navajo population.

All of the taxes involved in this case were on Lembke's receipts from its three construction contracts with the School Board,[3] covering the five-year period 1974-1978. JA 33. From the outset of planning and negotiating the project, the Board understood the construction cost included the gross receipts tax that the general contractor would have to pay.[4] JA-47-48. The Board's specifications for the contracts required that the gross receipts tax be included in a contractor's bid, JA 16, 58-59,

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[1] *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (S.Ct. 1962).

[2] *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (S.Ct. 1975).

[3] The contracts are listed and identified in Appendix A, *infra*.

[4] The construction architects who prepared the bid specifications themselves paid $24,000 in New Mexico gross receipts tax on their services for the Board which they by contract passed on to the Board as part of the architectural fees. JA 27; Tr. R. 37, 150-51. The Board initially sought a refund of this amount in the trial court, *ibid.*, but the claim was later abandoned.

60; Exh. D-3.[5] There were two bids on the project,[6] one from Lembke, and both bidders included the gross receipts tax in their bids in compliance with the bid specifications. JA 34; Tr. Pr. 319; Tr. R. 499-500. In fact all of Lembke's subsequent cost estimates on the remaining two contracts (see App. A) included the gross receipts tax as a project cost. Tr. R. 499-500. Lembke's usual bidding practice was to figure in the gross receipts tax on any New Mexico job as a cost of the project. JA 60. All Lembke's construction contracts with the Board expressly required Lembke to pay the gross receipts tax. JA 33. Lembke had paid gross receipts tax on its contract receipts, from 1974, when construction began, JA 54, to the completion of construction, and had regularly passed on the amount of the tax to the Board in its construction draws. JA 33-34. At some point before the second Lembke contract of July, 1977, the executive director of the Board questioned whether Lembke was liable for the gross receipts tax, Tr. Pr. 101, and a clause was put in the contract recognizing that the Board could litigate the issue and was entitled to any refund. Exh. P-35, art. 5.3; JA 13. Three years after construction began, and when the project was 75% completed, on December 12, 1977, Lembke and the Board filed an administrative request for refund of the tax they paid to date. Tr. R. 3. They filed their complaint for refund in the trial court in March, 1978. Tr. R. 7-9.

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[5] Para. 1Y of the General Requirements of the bid specifications, JA 148, contained in this Exhibit, prepared by the architects who were the agents of the Board, Tr. Pr. 168, provided:

> "All contractors . . . shall comply with provisions of New Mexico Sales and Use Tax Law and all amendments . . . and require all of their subcontractors to do likewise."

[6] See Appendix B, *infra*, for the buildings constructed in each phase of Lembke's work.

During construction Lembke issued New Mexico nontaxable transaction certificates to its subcontractors and material suppliers, Tr. Pr. 166, 174-176, the purpose of which is to prevent taxing construction services and materials twice by allowing subcontractors and material suppliers to deduct their sales to the general contractor from their gross receipts, §§7-9-51 and 7-9-52 NMSA 1978. Then only the general contractor's receipts will be taxed. *Ibid.* Use of the certificates and the deductions are not allowed, however, when the general contractor's receipts are not taxed, *ibid,* which Lembke understood. Tr. Pr. 174-76.

The Navajo Tribe furnished no financial assistance in building the Board's facilities. JA 33; Tr. Pr. 499. All of the funds for design and construction came from five annual Congressional appropriations to the Department of Interior totaling $9,136,000.[7] While the Tribe gave its "blessing" to the Board, Tr. Pr. 120, and authorized the Board on a yearly basis to secure federal funding for its operations directly under P.L. 93-638,[8] Exhs. P-9, P-11, JA 10-11, no further aid from the Tribe was forthcoming. No representative of the Tribe ever testified on behalf of the Board when it sought funding from Congress,[9] nor was the Tribe mentioned in any of the Congressional appropriations. Nor does

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[7] The appropriations, the first in 1972 and the last in 1977, are set out in Appendices B and C, *infra.*

[8] The Indian Self-Determination and Education Assistance Act of 1975, §25 U.S.C. §§250 et seq. (called in this brief the "Indian Self-Determination Act"). It permits Tribes and "tribal organizations" to "contract" with the BIA for services, i.e., to be given the money directly so that they can perform or buy the service that the BIA would have provided.

[9] Numerous Board members and three executive directors lobbied and appeared annually before appropriations committees of both houses from 1972 through 1979. Appendix C, *infra,* lists these hearings and cites each transcript year by year. References to these transcripts in this Brief will be to the year, the House or Senate and the page, the full citation for which will be in Appendix C, *infra.*

the Tribe make any significant contribution to the Board's operating budget.[10]

The Board is incorporated under New Mexico law. JA 31-32. It was incorporated as a funding mechanism, JA 41, Tr. Pr. 22, to qualify as a "tribal organization" under the Indian Self-Determination Act so that it, rather than the Tribe, could contract for and receive BIA monies for construction of the school. JA 33. The Board is not a political subdivision or agent of the Tribe. The Board, not the Tribe, owns the school buildings. Tr. Pr. 187. It secured the funding without the aid of the Tribe and it acted independently of the Tribe after receiving the funds. Tr. Pr. 112-13.

An Albuquerque BIA contracting officer approved Lembke's contracts, I Tr. R. 36, with the gross receipts tax included as part of the construction cost. JA 33-34, 58-59. The BIA had no role in the process of obtaining funds for construction. In fact, it consistently obstructed the Board's efforts to construct its schools. For this reason the Board bypassed the BIA and went directly to Congress for funding.[11] Tr. Pr. 71, 181,

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[10] The Board's total operating budget for 1979 was $7.2 million, $4 to $5 million of which was for school operations. Tr. Pr. 244. The remaining $2.7 million is to operate a health clinic and social service programs for the entire community. Tr. Pr. 243-44. The Tribe provided approximately $100,000 in "scholarships," Tr. Pr. 248-49, which would be 2.5% of the school operating budget, or 1.4% of the total operating budget. The rest was supplied by the federal government, Tr. Pr. 58, "contracted" by the Board under the Indian Self-Determination Act. See operating contracts between the Board and the BIA, Exh. P-38, JA 13.

[11] The record of Congressional testimony by Board members, see App. C, is filled with reported instances of BIA footdragging and inaction. The executive director of the Board even stated at trial that the Phase III appropriation of $2.062 million, see App. B, was made only because the BIA was *not* involved (other than as the "contracting" conduit to the Board, see pp. 25-26, *infra*). JA 45.

323-325. It then "contracted" with BIA to obtain the funds under the Indian Self-Determination Act. See App. A. The BIA did not exercise any substantive regulatory control over the Board, Lembke, or the architects. JA 42-43. Before construction began the Board simply notified the BIA which bidder it had selected and with which it was negotiating. JA 43; Tr. Pr. 84-85. During construction the BIA was merely the passive recipient of selected design and construction papers; there was no input or objection from the BIA. JA 42-43. Other than an equal opportunity employment clause, Lembke was not required by the BIA or the Board to include any particular provisions in its subcontracts. Tr. Pr. 172.

The Board has been operating the new school facilities since 1975.[12] JA 54. Its students number approximately 450. JA 35. The quality of the educational services it provides is quite good, JA 77, and the schools are a model of what can be done under the Self-Determination Act. Tr. Pr. 92-93. Because the school was built, the dropout rate has gone from 75% to around 5%.[13] Construction of the schools has also created employment in the Ramah community and upgraded it in significant ways.[14] Although not all the facilities that the Board wanted could be built, there was no particular building or facility that could have been built but for the state tax.[15] The

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[12] It actually has been operating its own elementary school and high school since 1970, first in leased buildings in Ramah and then at Pinehill beginning in 1975. JA 68.

[13] Testimony of the Board's executive director, 1978 Senate Test., p. 30, 1978 House Test., p. 168.

[14] *Ibid.*

[15] The testimony of the former executive director of the Board was: Q. ". . . [A]nd there was not a particular building that you can say we couldn't build simply because of the tax, is there?" A. ". . . [N]ot because of the tax, no." JA 56.

Board had to cut back on its projected budget for a number of reasons, among them because the architect overestimated what could be built with available funds, JA 55, because inflation greatly increased construction costs, *ibid.* and because Congress did not appropriate all funds requested. See App. C.

New Mexico did not deny educational opportunity to Ramah Navajos. Although the old high school at Ramah operated by the Gallup-McKinley County School District was closed in 1969 due to small enrollment, the District did provide bus service for high schoolers to nearby Zuni High School. Exh. P-43; JA 14, 124-127. Litigation over the school closing in state court commenced after the BIA and local school districts refused to reopen the school, Tr. Pr. 51-52, and the litigation ultimately focused on whether the bus routes the District did offer should be extended beyond the pickup points in Ramah. Tr. Pr. 20-21, 53, 220; Exh. P-41, p. 30. It was impossible to extend bus service because of the poor condition of roads in the Ramah area. JA 133 ff.; Tr. R. 42; Exh. P-43, JA 14, 124-127.

SUMMARY OF ARGUMENT

The Court should refine the "infringement test" established 23 years ago in *Williams v. Lee*, 358 U.S. 218 (1959) to resolve claims of infringement of tribal sovereignty. It should adopt the "legal incidence test" that has worked well to determine when state and local taxes infringe on the sovereignty of the United States. Application of the test to Indian-state disputes would significantly clarify this area of the law and may perhaps even end the case by case litigation that has, as one member of the Court characterized it, "plagued" this Court for a number of years. In this case the legal incidence of New Mexico's gross receipts tax is on the non-Indian construction contractor. The infringement claim is consequently without merit. If the Court

adopts the legal incidence test, New Mexico's tax would still be subject to scrutiny under the preemption test, for preemption is a second and separate requirement.

There is no infringement of Navajo sovereignty, even under *Williams v. Lee.* The Board lobbied Congress and appeared year after year to obtain the construction funding from the Congressional Appropriations committees. The Board received no construction funds from the Navajo Tribe; all of the $9.1 million spent for construction came from Congress in annual Interior appropriations. It received the blessing of, but no real support from, the Tribe in securing the funds from Congress. Even after construction the Board receives less than 3% of its operating budget from the Tribe, the lion's share coming from the federal government through "contracting" under the Indian Self-Determination Act. None of the construction funds went to the Tribe, none of the constructed buildings are owned by the Tribe, the Board operates separately and independently of the Tribe, and the Tribe itself permits the application of state attendance laws to schools on its reservation. The State is also not taxing "value created or generated on the reservation" by a tribe. The tax did not interfere at all with construction, for the Board actually received approximately $1 million more than it originally requested from Congress and its original request included the New Mexico gross receipts tax as part of the construction cost. Also, the Board spent over 14% of all construction appropriations just to administer the construction, which was 10% more than it told Congress it could do it for when it originally requested funding. The Board also used part of the school construction funds to build a health clinic for the entire community, a diversion from its school construction needs. Buildings the Board says couldn't be built because of New Mexico's tax were specifically denied appropriations by Congress, and in any case would have cost far more than the amount of the tax. The school's other shortcomings the Board

now says are caused by the state tax were never brought up in repeated Board appearances for more funding before committees of Congress after construction of the buildings was finished. Congress' and the Board's actions, not the State's determined what buildings the Board was authorized to build. The Board knew of the gross receipts tax in advance, budgeted construction to include it, and, as discussed in the following paragraph, passed the economic burden of the tax to Congress as effectively as any retail merchant would do.

The Board's case for preemption is totally unsupported by the case law and by the record of this case. The Congressional appropriations for the school construction were based on the Board's own construction funding requests that included the New Mexico gross receipts tax as part of the construction cost. Time and time again the Board sought funding from House and Senate committees, each time with the tax included as part of the requested construction costs. See App. C, *infra.* Furthermore, the BIA approved the Board's construction program budgets that included the gross receipts tax as part of the price of construction. In the face of these approvals it can hardly be said that the federal government has in some way preempted the gross receipts tax. The preemption inquiry in this case is whether Congress has completely regulated building construction on a reservation, because it is the gross receipts from that construction activity that New Mexico seeks to tax. Were the focus, though, on Indian education, as the Board contends, the Indian Self-Determination Act supports and recognizes state educational facilities for Indians, and it supports and funds state school construction, both on and off reservations, negating the Board's preemption notions. BIA regulations cited by the Board are not a part of a preemptive regulatory scheme. They merely regulate how a Tribal organization goes about "contracting," under the Indian Self-Determination Act, with the BIA to take over functions and monies of the BIA. They did not regulate how,

when, or where this taxpayer, Lembke, was to perform the construction work. Finally, that there is no case for preemption is further highlighted by the fact that in this case, unlike *White Mountain*, both the taxpayer and the Indian Tribe derive substantial benefits and services from the state. And unlike the taxpayer in *White Mountain*, the taxpayer in this case carries on business state-wide. It has enjoyed the substantial privilege of doing business in an "organized society," as well as receiving many individual benefits, such as use of New Mexico roads, police protection, use of the court system, and full state and municipal services. These privileges are funded from state general revenues, revenues generated by the gross receipts tax, among others. New Mexico's interest in being able to tax Lembke is thus quite substantial and the tax should be sustained.

This Court lacks jurisdiction of the issue of the preemption of New Mexico's tax by the Indian trader statutes, as this issue was never raised in or decided by the courts below. Nevertheless, the federal Indian trader statutes, 25 U.S.C. §261-264 and their regulations, likewise do not preempt the imposition of New Mexico's gross receipts tax on the construction services performed by Lembke. This is because Lembke's activities do not constitute Indian "trading." The statutes and their legislative history make it clear that the type of activities regulated are retail transactions in goods and merchandise which occur at trading posts or with itinerant peddlers of merchandise, not the sale of a construction service only, as Lembke was doing. Any regulation under the Indian trader statutes purporting to regulate a person whose sole activity is a service is *ultra vires*. Thus, when the seller's sole activity is providing a multimillion dollar construction service approved by Congress and the BIA, the activity is simply not covered by the federal Indian trader statutes.

Finally, neither the New Mexico Enabling Act nor the Indian Commerce Clause bar New Mexico's tax. The former argument

was laid to rest many years ago by cases holding that it is a disclaimer of proprietary interest only. The latter was soundly rejected by this Court in the recent *Colville* case.

I. THE COURT SHOULD EXPRESSLY ADOPT THE "LEGAL INCIDENCE" TEST TO DETERMINE WHETHER A STATE TAX INTERFERES WITH INDIAN SOVEREIGNTY.

Over the years the Court has fashioned the test of "legal incidence" to determine when a state tax infringes on the sovereignty of the United States of America.[16] In *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), this Court upheld the application of a non-discriminatory state gross receipts tax to the receipts of a federal contractor. So long as the legal incidence of the tax fell on the contractor, the fact that the economic burden passed to the United States did not bar the tax. Subsequent decisions of this Court[17] have strengthened that holding. For instance, in *Gurley v. Rhoden* this Court held that the legal incidence of a tax is on the vendor even though "the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise." 421 U.S. at 204.

It is settled that the legal incidence of New Mexico's gross receipts tax is on the seller of goods and services. *United States*

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[16] For the history of the rule, see Mahoney, "Federal Immunity from State Taxation: A Reassessment," 45 U. Chi. L. Rev. 695 (1978), and Tribe, "Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L. Rev. 682, 700 (1976).

[17] E.g., *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968); *Gurley v. Rhoden*, 421 U.S. 200 (1975); *United States v. County of Fresno*, 429 U.S. 452 (1977).

v. State of New Mexico, 581 F.2d 803 (10 Cir. 1978). New Mexico is entitled to levy its tax on federal contractors doing business on federal reservations even though the United States by contract reimburses the contractor for the amount of the tax. *Ibid.* Thus, had the BIA instead of the Board contracted with Lembke in this instance, the tax would be permissible under the legal incidence doctrine. *Cf., Commonwealth Edison Co. v. State of Montana,* ____U.S.____, (No. 80-581, July 2, 1981), where a state severance tax on minerals mined on federal lands was held valid even though it reduced the "economic rents" to the United States.

Application of the legal incidence doctrine to resolve this appeal is not without considerable support in the recent Indian case law of this Court. In *Colville*[18] and in *Moe*[19] state taxes were sustained "because their legal incidence fell on the non-Indian purchaser." *Colville,* 100 S.Ct. at 2080. And Justice Marshall, speaking for the majority in *White Mountain Apache Tribe v. Bracker,* 100 S.Ct. 2578 (1980), noted:

> Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted as *Moe v. Salish & Kootenai Tribes* . . . makes clear.
>
> 100 S.Ct. at 2587.

Justice Stevens in the same case said:

> A tax is not invalid simply because a non-exempt taxpayer may be expected to pass all *or* part of the cost of the tax through to a person who is exempt from tax. See *United States v. City of Detroit* . . .
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> 100 S.Ct. at 2591 (Dissenting op.).

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[18] *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 100 S.Ct. 2069 (1980).

[19] *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976).

To the same effect are Justice Stewart's comments in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592, 2598 (1980) (Dissenting op.).

There are at present two separate proofs to be made before a state's tax may be applied to a non-Indian on a reservation: first, it must not infringe on Tribal sovereignty, and second, it must not be preempted by the United States. *White Mountain, supra*, at 2538. The "infringement on sovereignty" test is clearly a standard in need of revision, for there are no objective criteria in its formulation and its only real content has come simply from a case by case inclusion and exclusion of sets of facts. Replacing it with the legal incidence test would go a long way toward clarifying when and how Tribal sovereignty has been infringed, for there would be the full body of federal intergovernmental immunity law from which to draw, because the test has worked over the years, and because tribes would receive the full measure of protection afforded the United States. Thus, it would end the anomaly of Indian tribes being more sovereign vis-a-vis the states than the United States itself. It would also harmonize with and continue the rules laid down in this Court's recent holdings, noted above, and in the not so recent ones as well, such as *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), where a state tax on a non-Indian lessee of Indian lands was upheld, with repeated references to the federal law on intergovernmental immunity.

The need for predictability in this field is great:

> . . . I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.
>
> *Colville*, 100 S.Ct. at 2093 (Rehnquist, J.).

Express adoption of the legal incidence rule would be a long stride toward the establishment of a reasonable degree of certainty in this field.

II. NEW MEXICO'S GROSS RECEIPTS TAX DOES NOT INFRINGE ON THE RIGHT OF NAVAJOS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

Even under the traditional "infringement" test of *Williams v. Lee, supra,* the gross receipts tax cannot be said to interfere with or inhibit the workings of Navajo tribal government. Other than permission to locate the school on the Ramah Reservation, the Board received little moral support from the Tribe in Window Rock. See p. 6-7, *ante.* In its quest for construction funding from the federal government it received nothing from the Tribe other than paper permission to be a "tribal organization" to receive self-determination money. And it received absolutely no monetary support for construction from the Tribe.[20] *Ibid.* None of the construction funds from the federal government came to the Tribe and it owned none of the buildings constructed by the Board. *Ibid.* Only an insignificant part of the Board's operating budget comes from the Tribe. See fn. 10. Other than that, the Board operates completely independently of the Tribe. Moreover, the Tribe permits the application of New Mexico's compulsory school attendance laws on the reservation, 10 Nav. Tr. Code §103, with the approval, or perhaps at the initiative, of Congress. 25 U.S.C. §231.

Significantly, the entire project was built not with tribal funds but solely with federal appropriations. New Mexico's

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[20] Despite the fact that funds available for expenditure by the Tribe were, in 1979 for instance, approximately $100 million. Annual Budget of the Navajo Nation, FY 1979, Window Rock, Az.

tax thus does not interfere with or reduce the yield from "value generated on the reservation" by a Tribe,[21] a significant circumstance noted by the Court in *Colville* in sustaining Washington's tax, the legal incidence of which also fell on non-Indians.

Not even the economic burden of the tax was on the Board, for it was able to effectively pass it on to the United States from the outset. The Board planned the school facilities on the assumption that the tax was to be paid by the contractor and passed on to the Board, and Congress also funded the project on that assumption. See p. 21-22, *infra.* In this way the Board was able to effectively pass the economic burden of the tax to the United States as any retail merchant or contractor would do in contracting for government work.

It is the Board itself that bears the responsibility for any alleged shortfall in construction funds for contracting.[22] It represented to Congress in 1973 that the BIA wanted too much – approximately 10% – of the construction funds to administer the project, saying that it could do the same thing for 4%.[23]

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[21] *Colville,* at 156-57; *Merrion v. Jicarilla Apache Tribe,* ____U.S.____, 50 L.W. 4169, Jan. 25, 1982.

[22] Actually the Board received more than it initially asked Congress for. In 1974 it told Congress that although the BIA estimated the project would cost $12-15 million, "our design and construction figures come down to $8 million to complete what is needed" (1974 House Test., p. 265), and that "the entire POR [project] can be completed for $8.3 million." *Id.,* at 263. And that $8 million included the gross receipts tax. See pp. 19-20, *post.* The Board finally ended up with $9.1 million, and later requested another $14.7 million. 1979 House Test., pp. 386-388.

[23] Testimony of the Board's executive director, 1973 Senate, p. 3617: "To show you that the coyote is still around, he has already wanted to rip off $310,000 of that [$3 million] for what is termed as the administrative cost. We can do that administration for 4 percent." See also 1973 Senate Test., p. 3620.

In actuality the Board did it for much, much more: it consumed $1.3 million or 14.5% of all the construction funds made available by Congress, presumably to administer Lembke's work.[24] In addition, the Board built a health clinic staffed by a medical doctor, dentist, and nurses, and fully equipped to serve the entire community. Tr. Pr. 57, 244, with some of the appropriations Congress intended for "construction of school facilities and school equipment." 87 Stat. 1073, 88 Stat. 810. Moreover, the Board's executive directors and members who testified before House and Senate committees in 1974 or 1975 to request Phase II construction funding, never mentioned a health care facility. They did ask for a laundry, bus garage, dormitories, housing, trailer park, cafeteria and administrative offices.[25] 1974 House Test., p. 265; 1975 House Test., pp. 275-277. Just how much these two expenditures totaled is impossible to say, but the amount of state gross receipts tax pales in comparison.[26]

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[24] $9,136,000 was given to the Board, but only $7,818,402 was spent on construction contracts to build, design and equip the school. See App. A. Thus, $1,317,598 or 14.42% of the funds was spent to administer construction.

[25] And they did ask for $355,000 in operating funds to run the clinic in FY 1978 after it had been built. 1977 House Test., p. 601.

[26] The operating costs for the school are also extravagant. For an enrollment of 450 pupils, JA 35, the operating budget is between $4 and $5 million. Tr. Pr. 58. That amounts to a per pupil cost of $10,000 per year, which is five times the average per pupil cost of $2,103 for New Mexico public schools with enrollments up to 1,000. Statistics 1978-79, Public School Finance Division, Dept. Finance and Administration, State of New Mexico. The Board's per pupil construction cost was also a hefty $20,222, which was approximately twice the average per pupil cost for state and BIA schools of comparable size. Statistics, State of New Mexico, Dept. Fin. and Admin., Public School Capital Outlay Council, Santa Fe, N.M. (1982).

The Board says that it still needs a cafeteria, classrooms, administrative offices and landscaping, and attempts to attribute the lack of these facilities to the state's tax. Bd. Br. 7. Each of these buildings, it should be noted, would have cost more than New Mexico's tax. For example, for the cafeteria the Board requested on various occasions $1 million, $1.1 million, $1.2 million and $1.7 million to build it, and each time it did so, Congress refused to appropriate it.[27] In any case, there is a functioning cafeteria on the school premises, JA 56, although it is not a separate building. As for additional classrooms, the Board never suggested in testimony to Congress after Phase I, during which the classrooms were built, that more were needed.[28] The Board does have administrative facilities in portable buildings, JA 57, and again the Board never asked Congress for such a separate permanent building for administrative facilities, even in its last request to Congress.[29] It then wanted $14,728,311 over and above the $9,136,000 that it had already received,[30] the size of the request indicating that the Board had covered all its real needs.

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[27] See App. C., *infra.*

[28] See 1976, 1977 and 1978 House and Senate Test., App. C.

[29] *Ibid.*

[30] 1979 House Test., pp. 395-397. The executive director of the Board, in asking for $3.3 million for staff housing, $2.7 million for an auditorium, $1.7 million for a cafeteria, $5.3 million for dormitories, and $1.6 million for roads, told the Subcommittee: "The school facility is only half completed at this time, and we believe that unless we are given funds to complete the school construction project, the treaty of 1868 . . . goes unmet, the spirit of 93-638 is stalled and we are not able to determine our future destiny. Most importantly, the equal education of our students is stalled because we won't have adequate facilities to house and teach our students." *Id.* at 391. Congress failed to appropriate any funds for the Board.

To ascribe to New Mexico's tax the supposed unfinished state of the school facilities is to ignore the dynamics of the funding process. Year after year the Board came back to Congress for more money. See App. D. Each time Congress gave the Board less than it asked for, forcing the Board to reorder its construction plans and to prioritize its budget requests.[31] And the very same construction costs that it projected to Congress included New Mexico's gross receipts tax. See pp. 19-20, *infra*. It was Congress that determined the extent of the school facilities the Board was to receive, not the State of New Mexico. The state's tax posed no obstacle whatsoever for the Board's construction,[32] and the infringement claim should be rejected.

III. CONGRESS HAS NOT PREEMPTED NEW MEXICO'S GROSS RECEIPTS TAX ON THE RECEIPTS OF THE CONSTRUCTION CONTRACTOR.

The preemption contentions in this case are ill-founded, for Congress has no pervasive scheme of regulation of the activity of building construction on a reservation.

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[31] See 1976 Senate Test., p. 2051 and funding requests for 1975-1978, App. C.

[32] In fact even after the Board's executive director questioned whether Lembke was liable for the tax, bringing it up to the Board's attorney in 1976 or early 1977, Tr. Pr. 101, the Board never uttered a word of the alleged infringement of tribal sovereignty and supposedly disastrous diminution of construction funds to the Congressional committees it returned to for funding time and time again. See App. C.

A. Congress and the BIA were presented with construction budgets that included the gross receipts tax and they approved them.

The Board included New Mexico's gross receipts tax in the construction costs that it presented to Congress on numerous occasions over an eight-year period. See App. C, *infra.* This is evident from the fact that the dollar construction cost estimates and requests the Board gave to Congress for Phase I were prepared by the Board's architects,[33] the same architects who prepared the bid specifications that required Lembke and other bidders to include gross receipts tax in the project cost[34] and who themselves paid gross receipts tax on their own architectural services.[35] And not only did the Board know from the "outset" that construction costs included gross receipts taxes, JA 47-48, but also the construction figures its executive director[36] presented to Congress year after year, obviously included gross receipts tax. For example, Lembke's contract price for the instructional media center it built in Phase III included gross receipts tax.[37] The $2,062,000 Congress gave to the Board for the instructional media center in 1977 was exactly what the Board estimated that facility would cost in

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[33] Testimony of the Board's executive director, 1973 Senate Test., p. 3618, 1974 House Test., p. 265.

[34] See text accompanying fn. 5, *ante.*

[35] See text accompanying fn. 4, *ante.*

[36] This was Mr. Manuelito. He was also the witness who testified at trial that gross receipts tax was included "from the outset." JA 47-48. He appeared before House and Senate committees seeking funds on behalf of the Board on eight occasions over the eight-year period, each time with dollar construction costs attached to specific proposed buildings. Most of the requests were also prioritized by building. See App. C, *infra.*

[37] JA 33-34, 54; Tr. R. 499-500; Exh. P-36, JA 13.

testimony to Congress.[38] Moreover, after the Board's first contract with Lembke in 1974 (see App. A), a document that expressly included the gross receipts tax as a cost, the Board returned to Congress time after time (see App. C) without ever saying a word to change its original budget assumption, namely, that from the "outset" the figures it gave the House and the Senate included the gross receipts tax as part of the construction cost estimates.

The BIA approved inclusion of the tax as part of the project cost. It contracted with the Board five times based on the Board's estimates of construction costs which included the gross receipts tax. Appendix A, *infra.* It also approved Lembke's contracts which expressly obligated Lembke to pay the tax.[39] If anyone at the BIA ever thought the tax interfered with one of its regulatory schemes, or that it violated tribal sovereignty, he never expressed it.

B. The focus of the preemption inquiry in this case should be on construction because that was the contractor's taxable activity.

The weakness of the preemption contention in this case is obvious from the Board's attempt to switch the subject of regulation under consideration from construction to education. The Board would have the focus be on the use to which the

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[38] The Board asked for an additional $9.5 million which was not appropriated. 1976 House Test., pp. 494-495; 1976 Senate Test., p. 2055. The additional requests were staff housing – $2.524 million, a cafeteria – $1.254 million, dormitories – $3.763 million, and an auditorium – $2.007 million. *Ibid.* But the Board's "first priority" was the $2.062 million instructional media center, 1976 Senate Test., p. 2051.

[39] JA 33.

buildings are put, not on the taxable activity of construction. This approach, however, besides being unworkable,[40] is also a radical departure from the preemption inquiries in *Warren Trading Post*[41] and *White Mountain, supra.* These cases looked solely to the taxpayer's activity triggering the state tax, not to the activity of the consumer purchasing the taxpayer's goods or services. The Board's theory, if applied to the facts of *White Mountain,* for example, would disregard the logger's taxable activity and zero in on the use to which the logs are put. That is not this Court's test of preemption. New Mexico is taxing construction receipts, not education; Congress has not regulated construction[42] and has thus not preempted the tax.

C. Congress has not preempted Indian education; on the contrary, it has recognized the state's role in Indian education and supported state construction of Indian schools, even on reservations.

The Board recites a number of federal statutes from which it wishes the Court to conclude that Indian education on the reservation has been preempted. While there is no doubt that Congress, as trustee, has been long concerned about the education of its "ward," these statutes do not add up to a framework, scheme or plan for education that will be interfered with by New Mexico's tax. The Johnson-O'Malley Act,[43] which the

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[40] If the focus is not on the taxable activity but on the use to which the product of the activity is put, then, for example, any state tax on a wholesaler of goods supplying an Indian "trader" on a reservation, would be preempted.

[41] *Warren Trading Post Co. v. Arizona Tax Comm'n.*, 380 U.S. 685 (1965).

[42] See p. 25-26, *infra.*

[43] 25 U.S.C. §§452-457.

Board somehow finds supportive of its argument, Bd. Br. 27, actually provides funds to the states for Indian education. It was passed in order to have the states take over the burden of educating Indians, enabling the federal government to transfer large numbers of Indians to state schools.[44] As of 1970, 68% of all Indian children were enrolled in state schools[45] both on and off reservations and 42% of Indian children in New Mexico were being educated in state schools.[46] The Indian Self-Determination Act in Title II[47] both recognizes and supports local school districts of a state educating Indians on and off reservations,[48] a circumstance acknowledged by even the Board's counsel.[49] The State of New Mexico operates schools on Indian Reservations. Tr. Pr. 321. It has a significant role[50] in Indian education, as is also detailed in *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N.M. 1973) and in *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (S.Ct. 1975). Far from there being any Congressional intent to exclude the states from Indian education, the very opposite has been true, and it has

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[44] See Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy," 56 Tex. L. Rev. 1195, 1203, 1212 (1978) (cited as "Gross), and see Szasz, *Education and the American Indian*, University of New Mexico Press, 1974, pp.89-122 ("Szasz").

[45] Taylor, p. 81.

[46] *Id.* at 177.

[47] This actually is the Education Assistance Act. In any case, it is Title II's provisions authorizing "contracting" for BIA programs and the BIA regulations under that title that lie at the heart of the Board's preemption notions. See Bd. Br., 27-29.

[48] 25 U.S.C. §458.

[49] Gross, at 1200-1201.

[50] For the states' role generally, see Final Report to the American Indian Policy Review Comm'n, Task Force Five: Indian Education, at 411-413 (1976); Szasz, pp. 181-187; Taylor, pp. 30, 81-86.

taken explicit form as recently as 1975. In that year Congress passed the Indian Self-Determination Act, including a provision expressly supporting school construction by state education agencies and local school districts, 25 U.S.C. §458,[51] and the legislative history of the Act specifically refers to this support as one of the purposes of the legislation.[52]

Nor do the Interior regulations the Board relies on, 25 C.F.R. Part 271 and 25 C.F.R. Part 274,[53] have anything to do with Lembke's substantive construction activities. They merely detail the procedures by which tribes may apply for contracts with the BIA to carry out BIA programs with funds that would have been the BIA's. The limited function of the regulations is made clear by the regulations themselves: Part 271's purpose is

> . . . to give the application and approval process for non-profit contracts with the Bureau under section 102 of Title I of the Indian Self-Determination and Education Assistance Act. . .
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> 25 C.F.R. §271.1(a)

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[51] Section 458(a) reads: "The Secretary is authorized to enter into a contract or contracts with any state agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian Reservation or other lands held in trust by the United States for Indians. . ."

The Board's counsel recognizes that "although the Act purports to strengthen tribal governments, it leaves significant control over a vital area of Indian life – education – in the hands of non-Indian controlled education agencies and local public school districts." Gross at 1209.

[52] House Report No. 93-1600, 1974 U.S. Congr. & Adm. News 7780-82.

[53] Authorized respectively by 25 U.S.C. §450f and by 25 U.S.C. §§458 and 458d, all provisions of the Indian Self-Determination Act. The Board also relies on 25 C.F.R. Part 31, but this is merely a collection of BIA regulations governing its own education functions.

Part 274's purpose is:

> . . . to give the application and approval process for obtaining a contract or services from the Bureau for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations under . . . Title II . . .
>
> 25 C.F.R. §274.1

To contend that these regulations under the Indian Self-Determination Act are a legislative scheme for school construction akin to the one governing the harvesting of timber in *White Mountain* is quite misleading and incorrect. The thrust of the Indian Self-Determination Act was to free Indian tribes of paternalistic federal regulation and to do away with restrictive and excessive BIA control.[54] In effect Congress was taking a first step in "deregulating" and "demonopolizing" the delivery of governmental services to Indians. It authorized Indians to obtain the money that the BIA was given for their benefit. To say, as the Board does, that the very legislation deregulating Indian services is a regulatory scheme preempting state tax, is to argue nothing more than that simply because there is legislation on the books directed toward Indians, state jurisdiction is preempted. This contention has previously been presented to and rejected by this Court. In *Colville* the Tribes cited the same Indian Self-Determination Act and other statutes directed at aspects of the well being of Indians as a basis for preemption of state tax. The Court, however, ruled that while the statutes evidenced "varying degrees of Congressional concern with fostering tribal self-government and economic development," they were not a firm basis for preemption. 100 S.Ct. at 2082. The same is true in this case.

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[54] House Report No. 93-1600, 1974 U.S. Congr. & Adm. News 7775-76, 7780-83; Remarks of Congressman Meeds, one of the sponsors, 120 Cong. Rec. 414045 (Dec. 19, 1974).

Finally, the record of BIA regulatory and supervisory control over Lembke's construction is very clear in this case: there just wasn't any. See p. 7, *ante*. The BIA was merely the passive recipient of occasional construction papers, exercising no regulatory function of any significance on this project at all.

D. New Mexico has provided the taxpayer and the Ramah Navajos with benefits that justify assessment of its tax.

This is "a case in which the state seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall."[55] New Mexico does provide Lembke with substantial state services. In contrast to the solely on-reservation activity of Pinetop in the *White Mountain* case, Lembke is headquartered in Albuquerque and does substantial business statewide. The general and administrative office functions of its contracts with the Board were performed in Albuquerque, not on the reservation. Its subcontractor dealings, procurement of materials, and payroll and administrative work were done in Albuquerque. It thus received significant benefits from New Mexico, and that is enough to sustain its interest to tax. Cf., *Commonwealth Edison Co. v. State of Montana*, 49 L.W. at 4961. The burden was on the Board to prove a lack of benefits and services to Lembke, something that it never even attempted. It was not up to the state to show the contrary, for the rule is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. *Norton v. Dept. of Revenue*, 340 U.S. 534 (1957); *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 279 U.S. 306 (1928).

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55 *White Mountain, supra*, 100 S.Ct. at 2586.

Beyond this support for New Mexico's power to tax, however, are the substantial benefits and services the state has extended to the Ramah Navajos themselves, the extent of which is clear in the record. State education, welfare, tax and indirect benefits to the Ramah Navajos amounted to $280 per Ramah Navajo in 1977.[56] New Mexico has obviously more than amply demonstrated the interest it has in being able to tax Lembke, and the balancing of interests inquiry mandated by the *White Mountain* case heavily favors the state.

IV. NEW MEXICO'S GROSS RECEIPTS TAX IS NOT PREEMPTED BY THE INDIAN TRADER STATUTES.

This Court lacks jurisdiction under 28 U.S.C. §1257(2) to review this question because this issue was not raised in or decided by the New Mexico courts below. Although the Board raised preemption arguments with regard to other federal enactments (see Point III, ante), the issue of preemption by the federal Indian trader statutes and regulations is raised for the first time before this Court. As this Court has repeatedly held, the failure to properly raise an issue below deprives this Court of jurisdiction over the question. *Safeway Stores v. Oklahoma Grocers,* 360 U.S. 334, 342 n. 7 (1959); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1968); *Hill v. California,* 401 U.S. 797, 805 (1968); *Tacon v. Arizona,* 410 U.S. 351, 352 (1972).

Even on the merits, the Board's contention is wrong. New Mexico's gross receipts tax on Lembke's construction receipts is not preempted by the federal Indian trader statutes, 25 U.S.C.

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[56] The Board has quibbled with the *amount* of benefits but not the underlying fact that they were furnished.

§§261-264. Although this Court ruled in *Warren Trading Post, supra,* that Congress had fully taken in hand the business of Indian "trading" on reservations and that no room remained for state laws imposing additional burdens on traders, Lembke's activities in this case do not come within the ambit of the Indian trader statutes. This is because Lembke's construction activities do not constitute Indian "trading" within the meaning of the Indian trader statutes.[57]

The Indian trader statutes and their extensive legislative history show clearly that these statutes were drafted in contemplation of the types of retail transactions in goods which could reasonably be expected to occur at Indian trading posts or with itinerant peddlers of merchandise. For instance, 25 U.S.C. §261 provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the *kind and quantity of goods* and the prices at which such *goods* shall be sold to the Indians. (Emphasis added.)

Section 262 of Article 25 concerns the authority of the Commissioner of Indian Affairs to regulate those engaged in Indian trading. Although no mention of "goods" is made, the type of activities which Congress contemplated in the term "trade with Indians" is indicated by the provisions of 25 U.S.C. §261. This conclusion is fortified by the well-settled principle of statutory construction that statutes concerning the same subject matter are to be read *in pari materia. Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954). Further support is also found in 25 U.S.C. §§263 and 264. Section 263 provides:

---

[57] Lembke never sought or received a trader's license, nor did the BIA require Lembke to obtain one. That this issue is being raised at this late date shows that it is an afterthought.

> The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of *goods,* or *of any particular article,* into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. (Emphasis added.)

Section 264 provides in relevant part:

> Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to *introduce goods,* or to trade therein, without such license, shall forfeit *all merchandise* offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . . (Emphasis added.)

Thus, the language of the Indian trader statutes themselves makes it clear that Congress never intended them to cover the activity in this case, a multi-million dollar construction project, funded and approved by the federal government. That sort of business activity is simply not the type of activity in which Indian traders have traditionally engaged. As this Court stated in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) at 206:

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and those who drafted them. (Citation omitted.)

The legislative history of the many congressional enactments regulating Indian trade since 1790[58] points to this conclusion. This legislation and the testimonials given to Congress are replete with references to goods,[59] merchandise, and other forms of tangible personal property, such as horses,[60] liquor,[61] weapons,[62] instruments of husbandry,[63] articles of clothing,[64] skins and furs,[65] and cooking utensils.[66] Without unnecessarily quoting from the Acts of Congress and the legislative history surrounding those Acts, suffice it to say that there is absolutely nothing to be found which would indicate that Congress contemplated Indian trading to include the rendition of services only.

The Board relies on *Rockbridge v. Lincoln*, 449 F.2d 567 (9 Cir. 1971), as implying that the trader statutes do cover services. Bd. Br., 34. Apparently the Board refers to credit transactions, in the form of loans, pawns and sales of merchandise on open account, which took place at trading posts on the Navajo Reservation. These credit transactions, however, occur in the context of the post's normal business of buying and

---

58 Act of July 22, 1790, 1 Stat. 137. The full list of Congressional enactments regulating Indian Trade is listed in Cohen: Handbook of Federal Indian Law (1942), pp. 348-351, fn. 2.

59 E.g., Annals of Congress, 4th Congress, 1st Sess., 1796-97, pp. 230, 240, 242, 284 and 286.

60 Act of March 1, 1793, 1 Stat. 329, §§6, 7.

61 Act of March 30, 1802, 2 Stat. 139, §21.

62 Act of April 18, 1796, 1 Stat. 452, §7.

63 Fn. 59, *ante*.

64 Fn. 61, *ante*.

65 Fn. 61, *ante*.

66 Act of March 3, 1799, 1 Stat. 743, §9.

selling goods and merchandise. The practice of engaging in these minor credit transactions incidental to the sale of the trader's merchandise is a traditional practice commonly engaged in by trading posts throughout our history.[67] This was because Indians, isolated on reservations far from cities and commercial centers, went to the only commercial center available, the trading post, when banking transactions, such as loans and check cashing, were needed. Such credit transactions obviously fall within the generally accepted view of what constituted Indian trading. They are ancillary to the business of Indian "trading," further strengthening the state's position on this question.

The Board would now have this Court construe the federal Indian trader statutes to cover commercial activity of any kind occurring on an Indian reservation, sweeping up the mining of coal and other minerals, and the severing of oil and gas, and turning reservations into tax havens immune from the reach of state taxes. These "enclave" notions have been firmly rejected in *Colville*, and *Moe*, and not even in *Central Machinery* or *Warren Trading Post* did this Court give the trader statutes such a broad sweep. The only commercial transactions to which this Court has applied the trader statutes are ones which have involved the sale of *goods* to Indians or an Indian tribe. *Warren Trading Post, supra; Central Machinery Co., supra.* In fact, in *Central Machinery*, this Court stated that the Indian trader statutes were enacted "to protect Indians from becoming victims of fraud in dealing with persons selling *goods*." 100 S.Ct. at 2596

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[67] That Congress has long recognized that traders were involved in extending credit to Indians is evidenced by the Act of June 21, 1906, 34 Stat. 325, 366, which made it unlawful for traders on the Osage Reservation to extend credit to an individual Indian in excess of 75% of the next quarterly annuity to which the Indian was entitled. See *Tinker v. Midland Valley Co.*, 231 U.S. 681 (1914).

(Emphasis added). Although Lembke does indeed sell construction materials to the Board, it does so only in the context of performing the service of constructing a building into which the materials are incorporated. (JA 61).

The implication of the *White Mountain* case is also supportive of the conclusion that the trader statutes do not cover every commercial transaction on an Indian reservation. In that case the non-Indian contractor, Pinetop, was performing a service, the cutting and hauling of tribal timber, and this Court relied not upon the Indian trader statutes, but upon the federal regulations governing the harvesting and management of Indian timber in striking down Arizona's taxes. This was in spite of the fact that under the reasoning of *Central Machinery* argued concurrently and decided the same day as *White Mountain*, Pinetop need not actually have applied for and been granted a trader's license for the tax to have been preempted.

To apply the Indian trader statutes to Lembke's activities would distort the meaning of "Indian trader" far beyond the intent of Congress. It is significant that the United States took the same position before this Court in the *White Mountain* case:

> Although it is not subject to the licensing requirements applicable to the trader in *Warren Trading Post*,[9] Pinetop is engaged in selling to Indians on a reservation. It sells its services to Fatco, . . .
>
> [9] References to "goods" in statutory provisions and regulations governing licensed Indian traders (see, e.g. 25 U.S.C. 264; 25 C.F.R. 251.3, 251.6), and the commonly accepted meaning of the term "trader," make it clear that sales of services are not governed by these provisions.
>
> First Br. for U.S. as Am. Cur., p. 11.

This accords with the holdings of lower courts that have considered the question. *Mescalero Apache Tribe v. O'Cheskey*,

supra, is particularly relevant since the precise question, involving the identical tax, was ruled on by the United States District Court in 1977. At issue was whether New Mexico could impose its gross receipts tax upon non-Indian contractors performing construction services for the Mescalero Apache Tribe on the Mescalero Reservation. There the BIA had issued Indian traders licenses to the contractors. Holding that the BIA acted *ultra vires* in so doing, Judge Bratton wrote:

> There are marked differences between the nature of the activities undertaken by the contractors in this case and the kind of activities the federal licensing statutes and regulations cover.
>
> 439 F.Supp. at 1067.
>
> * * *
>
> What is determinative of the issue is the nature of the work done, the circumstances surrounding its performance, and the persons by whom it was done. Other than to issue the licenses to the contracting firms, there was no effort to impose the other requirements of the federal laws and regulations. Nor is there any evidence that it was ever intended that there be, no doubt because they simply did not cover the situation.
>
> *Id.* at 1068.

Neither the United States, which was a party to the case at the trial level, nor the Tribe appealed this aspect of Judge Bratton's ruling.

Another federal district court has also interpreted the Indian trader statutes to be inapplicable to the sale of services on a reservation. In *United States ex rel. Keith v. Sioux Nation Shopping Center,* 488 F.Supp. 496 (D.S.D. 1980), Judge Bogue stated that "trade involves the exchange of *commodities* for other *commodities* or money." 488 F.Supp. 496 (Emphasis added). Accordingly, he dismissed charges of trading with Indians without a license in violation of 25 U.S.C. §264 against two defendants who sold insurance on a reservation, finding

that such sales were sales of a service, not of goods. See also *Palm Springs Spa, Inc. v. Riverside County*, 95 Cal.Rptr. 879, 18 C.A.3d 372 (1971), holding that the Indian trader statutes do not govern all commercial activity on Indian land.

The Board points to the federal regulations applicable to Indian trading on the Navajo, Hopi and Zuni Reservation, 25 C.F.R. Part 252, J.S. 86-87, as preempting New Mexico's tax since those regulations purport to regulate the sale of services on the Navajo Reservation.[68] Bd. Br., 33. This reliance is misplaced. To the extent that the regulations of Part 252 regulate services such as Lembke's, they are *ultra vires* because they exceed the authority of the Secretary. It is hornbook law that administrative regulations which extend the application of the statutes which they implement are invalid and may be disregarded. *Federal Communications Comm'n. v. American Broadcasting Co.*, 347 U.S. 284, 296-297, *reh. den.* 347 U.S. 965 (1954); *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930); *Peters v. Hobby*, 349 U.S. 331, 342-343 (1955). As stated by Mr. Justice Harlan:

> . . . we cannot but regard this . . . regulation as no more than an attempted addition to the statute of something that is not there. As such the regulation can furnish no sustenance to the statute.
>
> *United States v. Calamaro*, 354 U.S. 351, 359 (1957).

For all these reasons, the regulations at 25 C.F.R. 252 can have no preemptive application in this case.

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[68] 25 C.F.R. 252.3(1), J.S. 87.

V. THE OTHER ISSUES RAISED ARE WITHOUT MERIT.

A. The New Mexico Enabling Act does not bar the tax in this case.

The Board urges that the New Mexico Enabling Act, 36 Stat. 558, Article XXI, §2 N.M. Constitution, prohibits the tax in this case. Bd. Br., 38-39. This contention is without merit. New Mexico's tax is upon Lembke's activities, not upon Indians or Indian land. The Enabling Act is a disclaimer of proprietary interest only, not a disclaimer of governmental interest or of jurisdiction to tax non-Indians. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Washington v. Confederated Tribes of the Colville Indian Reservation,* 100 S.Ct. at 2082. The same issue was raised in the Petition for Certiorari in the *White Mountain* case, *supra.* By invitation of this Court, the Solicitor General filed an amicus brief urging review of other issues raised in the case, but not of that one, stating: "This contention does not warrant review by this Court." Br. U.S. as *Am. Cur.,* 12-13. Certiorari was not granted on the issue.

B. The Indian Commerce Clause does not prohibit this tax.

In part B of its *amicus* brief, the United States suggests that this Court adopt an interpretation of the Indian Commerce Clause (Art. I, sec. 8, cl. 3), which would prohibit state taxation of on-reservation activity of non-Indians when the activity involves an Indian tribe. U.S. Br. 17-24. This approach is contrary to long-established precedent. At least since *Thomas v. Gay,* 169 U.S. 264 (1898), this Court has rejected the proposition that state taxation of non-Indians engaged in business activity on an Indian reservation is an interference with Congressional power over Indian commerce. More recently, this Court squarely rejected this proposal in the *Colville* case:

> It can no longer be seriously argued that the Indian Commerce Clause of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. *Moe v. Salish and Kootenai Tribes, supra,* 425 U.S., at 481, n. 17, 96 S.Ct. at 1645.
>
> 100 S.Ct. at 2083

Even though New Mexico's gross receipts tax may have economically impacted the Board (and ultimately the United States, we would add), since it is nondiscriminatorily applied to all construction contractors within New Mexico, the Indian Commerce Clause stands as no bar to the tax. *Ibid.* The United States also tried to raise the Indian Commerce Clause argument in *Central Machinery, supra.* See Br. U.S. as Am. Cur., 11-16. This Court declined the invitation to expand the Indian Commerce Clause in its decision in that case, and it should do the same here.

CONCLUSION

The judgment of the New Mexico Court of Appeals should be affirmed.

Respectfully submitted,

Jeff Bingaman
Attorney General of New Mexico

JAN UNNA
Special Assistant Attorney General
123 West Palace Avenue
Santa Fe, New Mexico 87501
(505) 988-7577

Gerald B. Richardson
Assistant Attorney General
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

Attorneys for Appellee

March 16, 1982

APPENDIX A

SELF-DETERMINATION CONTRACTS BETWEEN BIA AND BOARD				CONSTRUCTION CONTRACTS LET BY BOARD TO ARCHITECTS AND LEMBKE			
1. 10/20/71 (P.L. 92-369)	BIA water development	$200,000		1. Architectural services and supervision and BIA water development			$ 950,000
	Architectural services	750,000	$ 950,000				
2. 4/23/74 (P.L. 93-245)	Construction		2,700,000				
				2. 8/16/74	Phase I Lembke contract	$2,600,000	
				12/2/74	Change orders	1,075,422	3,675,422
3. 11/20/74 (P.L. 93-404)	Construction	800,000					
	Equipment	395,000	1,195,000				
4. 8/13/76 (P.L. 94-165)	Construction		2,229,000	3. 7/5/77	Phase II Lembke contract		1,892,980
5. 11/11/77 (P.L. 95-74)	Library		2,062,000	4. 10/24/78	Phase III Lembke contract		1,300,000
TOTAL			$9,136,000	TOTAL			$7,818,402

APPENDIX B

BUILDINGS CONSTRUCTED *		CONGRESSIONAL APPROPRIATION	
Design Phase		P.L. 92-369	$ 950,000
Phase I	Elementary School High School Gymnasium	P.L. 93-245 P.L 93-404	$2,700,000 $1,195,000
Phase II	Kindergarten Plant Management Facility Electric Co-op Payment Landscaping Baseball Field Basketball Facility Health Clinic	P.L. 94-165	$2,229,000
Phase III	Instructional Media Center	P.L. 95-74	$2,062,000

* Testimony of Chavez P. Coho, President of the Board, Hearings Before Subcommittee on Appropriations, House of Representatives, 3/5/79, on Department of Interior and Related Agencies Appropriations for 1980, part 6, p. 394..

APPENDIX C

BOARD REQUESTS TO SENATE AND HOUSE APPROPRIATIONS COMMITTEES			CONGRESS APPROPRIATED	
Year	*Amounts Requested*		*Amount*	*Statute*
1972 Senate 4/11 House 4/13	Water development Schools design TOTAL	$200,000 750,000 $950,000	$ 950,000	P.L. 92-369 86 Stat. 508 8/10/72
1973 Senate 5/11	School construction	$7.72 million	$2,700,000	P.L. 93-245 87 Stat. 1071 1/2/74
1974 House 4/8-9	School construction	$5.6 million	$1,195,000	P.L. 93-404 88 Stat. 803 8/31/74
1975 Senate 5/12 House 5/13	Dorm Instructional Media Center Kindergarten Staff Housing Cafeteria Furnishings TOTAL	$1.8 million 1.5 .3 .875 1.0 .4 $5.875 million	$2,229,000	P.L. 94-165 89 Stat. 977 12/23/75
1976 Senate 4/13 House 4/17	Instructional Media Center Staff Housing Cafeteria Dorm Auditorium Dorm TOTAL	$1.860 million 2.244 1.120 2.016 1.792 1.344 $10.376 million	-0-	-0-
1977 Senate 4/21 House 4/18	Instructional Media Center Staff Housing Cafeteria Dorm Auditorium Dorm TOTAL	$ 2.062 million 2.5245 1.254 2.258 2.007 1.5053 $11.6108 million	$2,062,000	P.L. 95-74 91 Stat. 285 7/26/77
1978 Senate 4/17 House 4/19	School construction	$ 9.6 million	-0-	-0-
1979 Senate 3/5	Cafeteria Dorm Staff Housing Auditorium Dorm Roads and Utilities TOTAL	$ 1,704,707 3,229,900 3,331,050 2,705,590 2,076,775 1,680,289 $14,728,311	-0-	-0-
	GRAND TOTAL	$66,460,111	$9,136,000	

Sources for Congressional testimony in this brief, including the previous portion of Appendix C, are as follows:

1. 1972:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 92nd Congress, Second Session, Part 5, pp. 240-242.

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 92nd Congress, Second Session, Part 4, pp. 3647-3654.

2. 1973:

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 93rd Congress, First Session, Part 4, pp. 3617-3627.

3. 1974:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 93rd Congress, Second Session, Part 5, pp. 1-3, 262-266.

4. 1975:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Congress, First Session, Part 7, pp. 270-281.

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 94th Congress, First Session, Part 4, pp. 1686-1692.

5. 1976:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Congress, Second Session, Part 7, pp. 492-505.

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 94th Congress, Second Session, Part 5, pp. 2050-2056.

6. 1977:

Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 95th Congress, First Session, Part 9, pp. 600-630.

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 95th Congress, First Session, Part 5, pp. 2207-2211.

7. 1978:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 95th Congress, Second Session, Part 9, pp. 160-169.

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 95th Congress, Second Session, Part 4, pp. 26-31.

8. 1979:

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 96th Congress, First Session, Part 6, pp. 386-412.

APPENDIX D

7-9-2 Purpose.

The purpose of the Gross Receipts and Compensating Tax Act is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

7-9-3 Definitions.

C. "construction" means building, altering, repairing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project;
(2) building, stadium or other structure;
(3) airport, subway or similar facility;
(4) park, trail, athletic field, golf course or similar facility;
(5) dam, reservoir, canal, ditch or similar facility;
(6) sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
(7) sewerage, water, gas or other pipeline;
(8) transmission line;
(9) radio or other tower;
(10) water, oil or other storage tank;
(11) shaft, tunnel or other mining appurtenance; or
(12) similar work;

"construction" also means:

(13) leveling or clearing land;
(14) excavating earth;
(15) drilling wells of any type, including seismograph shot holes or core drilling; or
(16) similar work.

* * *

F. "gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any receipts from sales of tangible personal property handled on consignment but excludes cash discounts allowed and taken, New Mexico gross receipts tax payable on transactions for the reporting period and taxes imposed pursuant to the provisions of the County Sales Tax Act, the County Gross Receipts Tax Act or the Municipal Gross Receipts Tax Act which are payable on transactions for the reporting period and any type of time-price differential.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

When the sale of property or service is made under any type of charge, conditional or time-sales contract or the leasing of property is made under a leasing contract, the seller or lessor may elect to treat all receipts, excluding any type of time-price differential, under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount, excluding any type of time-price differential.

"Gross receipts," for the purpose of the business of buying, selling or promoting the purchase, sale or leasing, as an agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commission or fees derived from the business.

"Gross receipts" also includes amounts paid by members of any cooperative association or similar organization for sales

or leases of personal property or performance of services by such organization.

* * *

K. "service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling property. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling.

"Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property.

7-9-4. **Imposition and rate of tax; denomination as "gross receipts tax."**

A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

7-9-51 **Deduction; gross receipts tax; sale of tangible personal property to persons engaged in the construction business.**

A. Receipts from selling tangible personal property may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the seller.

B. The buyer delivering the nontaxable transaction certificate must incorporate the tangible personal property as:

(1) an ingredient or component part of a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or

(2) an ingredient or component part of a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

7-9-52 **Deduction; gross receipts tax; sale of construction services to persons engaged in the construction business.**

A. Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service.

B. The buyer delivering the nontaxable transaction certificate must have the construction services performed upon:

(1) a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or

(2) a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

Supreme Court, U.S.
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No.80-2162

October Term 1981

IN THE

Supreme Court of the United States

RAMAH NAVAJO SCHOOL
BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,

Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee.

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REPLY BRIEF OF RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC.

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmberg & Gross
P.O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

Of Counsel:
Neal A. Jackson
April 1982

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I
NEW MEXICO HAS SERIOUSLY DISTORTED THE RECORD IN THIS CASE.

New Mexico's argument largely turns on two broad factual premises neither of which finds any support in the record or in the legislative history of the appropriations Acts involved.

First the State would have this Court believe that Congress authorized payment of this tax because, it says, Ramah's architects must have included the tax in the construction cost estimates given to Congress. It bases this inference upon the belief that the architects paid "$24,000 in New Mexico gross receipts taxes on their services for the Board," Ans. Br. 4 n. 4. However, All claims based on architects' payments were dismissed and no proofs were offered on the subject by either side. And so the trial court found, JS 49, no. 22, when it said: "(T)he architects . . . are not parties to the suit and have not exhausted their administrative remedies and there are no specific financial figures attributable to the gross receipts (sic, i.e., taxes) paid by them." (This finding was never challenged by the State and in fact had been solicited by it, Tr. Rec. 493.) Indeed, there is no evidence that the architects paid any gross receipts tax to New Mexico much less that they passed on the tax to the Board as Lembke did. Nor does the word tax appear in the legislative history of the Appropriations Acts, see Ans. Br. ix and x.

But, says the State, the architects must have known about the tax and included it in their estimates implicitly because they required bidders to include the tax in their bids and then required Lembke, the low bidder (on phase I), to pay the tax. Ans. Br. 4, 22. Again, neither assertion is correct. The bid solicitation said:

> All contractors . . . shall comply with provisions of New Mexico Sales and Use Tax Law and all amendments . . . and require all of their subcontractors to do likewise.

Ex. D-3, by Stipulation, 36-38, Ex. Vols. 99-111. Nowhere does this language direct bidders to include the New Mexico gross receipts tax as a part of their bids on the Ramah project. The language is clear and requires no parol evidence to interpret. It means that when a bidder is successful in negotiating a contract for the job, he will be required to comply with applicable tax laws, a perfectly understandable condition designed to protect owners and their projects from liabilities and disruption which may be caused if a contractor neglects to pay required taxes. Lembke would have been in complete accord with this provision had it noted in its bid that under Federal law its receipts from this project were immune from State gross receipts tax and thereafter so indicated on its monthly self assessment tax forms by taking a deduction for its receipts from the Ramah project.[1]

Similarly, the contracts between the Board and Lembke do nothing more than require Lembke to pay only those taxes which are applicable. Section 4.6.1, standard A.I.A. language, in each of Lembke's contracts says:

> The contractor shall pay all sales, consumer, use and other similar taxes *required by law.* (emphasis added)

P-32 through P-36, by stipulation at 36-38, Tr. Pr. 119, 155, 169, 182, 221. In express terms this language absolves Lembke from paying any taxes which are not required by law — federal law in this case. In any case, such language has previously been held not to constitute a

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1. See, §§7-9-55 and 7-9-57, N.M.S.A., 1978.

waiver of sovereign tax immunity. *United States v. County of Allegheny,* 322 U.S. 174, at 189 (1944).

In short there is no basis for concluding that "the Board knew from the 'outset' that construction costs included gross receipts taxes" or that the "construction figures its executive director presented to Congress year after year obviously included gross receipts tax". Ans. Br. 21. In any event, these estimates, were lump sum figures not broken down by component costs, so that even if the taxes had been included in them (which is not the case) Congress could have had no inkling of this. [2] Moreover, both the trial court (Finding 16, JS 47) and the Court of Appeals (JS 29) found and held that the School Board (not Congress) "sustained the financial burden of the tax".

Second, the State contends that the Board is not a true agency of Navajo tribal government. However, the record speaks decisively and conclusively to the contrary. The point is established by the resolution of the Ramah Navajo Chapter, a political subdivision of the Navajo Tribe, which authorized the formation of the Board pursuant to the Navajo Tribe's Education Code, Title 10, Secs. 51 *et. seq.*, P-46, JA 128; Tr. Pr. 192; and P-1(a), JA 114, by stipulation 36-38 and 81, 83. It is further bolstered by the requirement in both Public Law 93-638, 25 U.S.C. 450f, and its implementing regulations, 25 C.F.R. 271.11, that before the BIA may contract with a tribal organization such as the Board it must first be requested to do so by the tribe.

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2. Typical is the 1973 testimony alluded to by the State, at 21 n. 33, which simply says: "We have been using architectural consultants and they have given us a total of $7.72 million to complete phase I of our construction plans."

The Navajo Tribe has consistently made such requests throughout the Board's existence. P-6 through P-11, by stipulation 36-38, 78, 80, 81, 83, JA 10-11. Moreover, the Navajo Tribe's statutory scheme, Exhibit P-1(a), *supra,* requires the School Board to conform to certain procedures for electing board members, conducting business, and conforming to broad tribal education standards. The Board is thus a public agency of the Navajo Tribe as that term is understood by the Navajo Tribal Council. Therefore, quite apart from the dispositive fact that federal law defines the Board as a tribal organization for purposes of carrying out self-determination policies, 25 U.S.C. 450b(c), its role in the Navajo governmental system is that of a local public school board for the Ramah Navajo Chapter, entirely analogous to State public school districts, which also operate autonomously. See, e.g., 22-5-4 N.M.S.A., 1978; Cf. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1 (1974). [3]

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3. Contrary to New Mexico's contentions on these additional points:

A. Congress had been apprised of the construction of the Ramah Health clinic. Hearings Before A Subcommittee on Appropriations House of Representatives, 94th Cong., Second Sess., Part 7, at 496; Hearings, *supra,* 95th Cong., First Sess., Part 9, at 601 and 628; Senate Hearings Before the Committee on Appropriations, Dept. of the Interior and Related Agencies Apps. FY 1978, 95th Cong., First Sess., Part 5, at 2208.

B. New Mexico's claim that the Gallup-McKinley County School District . . . did provide bus service *for high schoolers* to nearby Zuni High School, (emphasis added), Ans. Br. 9, is grossly misleading: bus routes provided by the District after the State closed the Ramah School could reach only a tiny fraction of Ramah students. Tr. 178, 193-194; Ex. P-43; Tr. 181, 184, JA 124; Ex. D-C, Tr. 186, JA 133, JA 35. The State district court in *Ben Jose v. Gallup-McKinley Cty. Sch. Dist.,* No. 12,913, P-43, JA 124-127, Tr. Pr. 181, 184, found that extension of school bus routes into the Ramah Navajo area in Valen-

II

NEW MEXICO MISUNDERSTANDS THE RULE IN *WILLIAMS V. LEE*, 348 U.S. 218 (1959).

Under the State's view the infringement test in *Williams* applies only when State action directly impedes the activities of an Indian tribe's central governing body and then only when the governing body's activities are funded from tribal revenues.

This perception is of course contrary to the Court's view in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S.

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cia County, where the majority of Ramah students lived (Tr. Pr. 49 and 50), was feasible. It then ordered the District to take steps to ensure that routes would be so extended in order to enable Ramah Navajos to attend Zuni high school following the closure of Ramah high school in 1968. This was not done. It is also established after more than ten years of operation of school bus routes in the area by the Ramah Navajo School Board that such transportation can be consistently maintained.

C. Per capita education costs at Pine Hill did not amount to "$10,000 per year". Ans. Br. 18, n. 26. The State's assertion does not fully take into account that the Board was simultaneously operating a health clinic, social welfare programs, job training programs, a radio station, adult education program, and dormitory. Tr. Pr. 57, 243-244. The testimony was to the effect that the Board had effectively replaced the BIA itself and was operating "as a local government for that community." Tr. Pr. 57, and see House Subcom. Hearings, 96th Cong., First Sess., Part 6, at 387 and 393.

D. The Board did apprise Congress of the need for more classrooms after phase I was built. See, House Hearings, FY 1977, 94th Cong., Second Sess., Part 7, at 495, 496; House Hearings, 95th Cong., First Sess., Part 9, at 612, 613; House Hearings, 96th Cong., First Sess., Part 6, at 395.

E. The cafeteria had originally been planned in phase I. However, the bids came in considerably higher than estimated, so the self-contained cafeteria was reserved for a later phase and a makeshift cafeteria was juryrigged in space which had been intended for vocational education. House Hearings, 95th Cong., First Sess., Part 9, at 628.

164, 179 (1973): "In fact, we are far from convinced that when a State imposes taxes on reservation members without their consent, its action can be reconciled with tribal self-determination."

As demonstrated, *infra,* pages 3 and 4, the Board operates as an agency of Navajo tribal government. But even if this were not true, the nature of the function which the State has hampered — education — is so vital to tribal self-government and "essential tribal relations", *Williams,* at 219, that were the Board a private school regulated by Navajo tribal law, the tax in question could not be imposed. This is so because the tax constitutes an extra and unauthorized burden on the educational process at Ramah. It contributes to overcrowding and similar physical and instructional problems in this Navajo school on the Navajo Reservation. The tax thus interferes with a conceded governmental priority of both the Navajo Tribe and the United States to produce educated Navajo citizens, a need which this Court has long recognized as essential in a democratic society. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

Because the rule in *Williams,* as noted in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157, n. 13 (1973) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 164, n. 3 (1980), does not turn on the tribal means used to accomplish a tribal governmental goal, any State action which significantly impairs the ability of Navajos to govern themselves on the Navajo Reservation must fall.

The State also argues that since the monies used to construct these facilities came from the Federal government, there was no impact on Navajo self-government and the infringement test does not apply. On the contrary, this Court in both *Williams v. Lee* and *Fisher v. District Court,*

424 U.S. 382 (1976), protected the sovereign prerogatives of tribal courts from State incursions, even though the cost of tribal court systems and indeed much of the cost of tribal governments around the country is borne by the Federal Government.[4]

In brief, if the source of tribal funds for financing tribal government were determinative, then much of the protections against State interference with tribal governmental functions long recognized by this Court would vanish. Tribal governmental functions do not become any the less tribal or governmental because they are funded by the Federal government. Indeed the fact that States receive Federal funds to support the exercise of State powers has never been held to deprive such powers of their state or governmental character. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974).

The State would confine the *Williams* rule to activities of the central tribal governing body itself. For a tribe the size of the Navajos, such a limitation would vitiate the protections afforded by the rule. As is the case with States and the Federal government, the Navajo Tribe cannot carry out every function of government through its central

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4. In FY 1978 the BIA requested and received approximately $19,498,000 for Aid to Tribal Government. A major portion of these funds went to pay the costs of tribal courts. The BIA justified its request in part by saying: "One of the principal missions of the Bureau is to assist tribal governments in developing their capabilities to fully exercise their rights of self-government and self-determination and to effectively deliver or direct the delivery of services needed by Indian communities and the individuals and families residing therein." United States Dept. of the Interior, Budget Justifications, FY 1978, at IA-17 and IA-18; Pub. L. 95-74, 89 Stat. 985.

legislature, the tribal council.[5] It must delegate authority to local units of government, as it has done in Title 10 of its Tribal Code, Ex. P-1(a), *supra*.

The State objects to the *Williams'* formulation because it requires a measure of judgment. If certainty, however, is to be the sole objective, then, instead of gutting Indian treaty and statutory rights by giving States entire control of a labeling process upon which the applicability of a State tax affecting Indians would be based, the State's desire for certainty could as easily be fulfilled by returning to the flat rule of *Worcester v. Georgia*, 6 Pet. 515 (1832), barring exercise of any State jurisdiction on Indian reservations.

III

NEW MEXICO'S UNDERSTANDING OF PREEMPTION LAW IS SIMILARLY FLAWED.

A. Preemption Occurs Whenever A Federal Interest Is Impeded By State Action.

New Mexico fails to recognize that preemption occurs whenever a State takes action which significantly threatens the fulfillment of any valid Federal objective, program, policy, or plan. There is no requirement, as the State would suggest, Ans. Br. 20, that there be a "pervasive scheme of regulation" before preemption takes place. As Professor Tribe comments:

> The question whether federal law "preempts" state action, largely one of statutory construction, cannot be reduced to general formulas. In evaluating patterns

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5. Cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, N. 13 (1973) (". . . the question of [tribal] tax immunity cannot be made to turn on the particular form in which the tribe chooses to do its business.")

> of statutory interaction, the Supreme Court has declared generally that whether challenged state action has been pre-empted turns on whether or not it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Professor Tribe goes on to state:

> But state and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie the federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. See, e.g., *Jones v. Rath Packing Co.,* 97 S. Ct. 1305 (1977).

L. Tribe, *American Constitutional Law,* at 377, 378, 379 (1978). See also, G. Gunther, *Constitutional Law,* at 257 (9th ed. 1975), and Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands, 64 Iowa L. Rev. 1479 (1979).

For this reason the presence or absence of a comprehensive regulatory scheme either for Indian education generally or for Indian school construction is not dispositive.[6]

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6. Although not indispensable for a ruling in favor of the Board, there are comprehensive congressional schemes covering Indian education on reservations in general, on-reservation school construction and self-determination contracting, each of which has been impinged by New Mexico's tax, see *infra,* pages 11-14. Simply because States have been delegated a role in on-reservation Indian education does not

The necessary question is whether the State's tax has significantly impeded congressional objectives expressly stated in the Navajo Treaty, The Indian Self-Determination Act, and the purposeful appropriations made by Congress to this School Board for the construction of school and related facilities. (see JA 39, 40; and Pub. L. 93-245, 87 Stat. 1073, JS 11 and, Senate Hearings, Comm. on Appropriations, Dept. of the Interior, H.R. 8917, FY 1974, 93rd Cong., 1st Sess., page 3617).

In this case the fact that the New Mexico gross receipts tax has substantially impeded fulfillment of congressional objectives is evident from the State's stipulation and trial court's finding that the Board sustained the entire burden of this tax, $232,368.38 by the date of trial. JA 34, JS 51, 52.[7]

Whether this sum corresponds to the loss of an identifiable structure or component of the school construction project is immaterial. The school remains uncompleted. Classrooms had been planned for space which had to be converted into a makeshift cafeteria. House Hearings,

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diminish the pervasiveness of these schemes. Comprehensiveness does not turn on exclusivity. National defense is no less a Federal prerogative just because States operate National Guards, 32 U.S.C. secs. 101 *et. seq.* See, *Santa Rosa Band v. Kings County,* 532 F. 2d 655 (9th Cir. 1975), cert. den. 429 U.S. 1038 (1977), holding county zoning ordinances preempted from enforcement within reservation boundaries, even though housing and sanitation programs for Indians are not exclusively Federal functions, see 25 U.S.C. 231 and 452. Cf. *Kennerly v. District Court,* 400 U.S. 423 (1971).

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7. The State admits that its gross receipts tax operates as a sales tax. See Appendix A, excerpt from Taxation and Revenue Dept, brochure explaining the tax. And see *United States v. New Mexico,* _____ U.S. _____, _____ U.S.L.W. _____ (March 24, 1982), Slip Op. 1.

94th Cong., 1st Sess., Part 7, page 276. Landscaping has not been completed, so there is a perennial problem with mud. See, House Hearings for FY 1980, 95th Cong., Second Sess., part 9, page 168. Certainly inflation also helped deplete the value of the resources available to the Board, but the tax itself is unquestionably substantial and depleted the resources needed for construction. Its recovery will advance the completion of the school and help Congress meet its treaty obligation to the Navajos as well as its commitments under The Indian Self-Determination Act. For these reasons, the tax has plainly impeded "the full purposes and objectives of Congress." *Hines, supra* at 67.

B. The Preemptive Force Of The Indian Self-Determination Act, As Well As The Indian Trader Statutes, Avoids The Uncertainty, If Any, Of The Infringement Test And Disposes of This Case.

A Federal statute makes clear that the tribal government function involved here has drawn special attention from Congress and therefore is protected by Federal law. In the Indian Self-Determination Act, Congress has created a discrete program for improvement of Indian education under which tribes and tribal organizations may take over the management of their own governmental affairs without losing the benefits of Federal protection and funding.[8] Moreover, Congress has taken special pains to allow

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8. In recognition of the extra costs incurred when tribes operate Federal programs, Congress has appropriated annual funds for contract support whose purpose "is to pay tribes for the overhead costs they incur as a result of entering into P.L. 93-638 contracts." United States Dept. of the Interior, Budget Justifications, FY 1981, at BIA-59. The Board did not, however, receive contract support funds

the Ramah Navajo Community to construct its own school facilities so that its children could come home from boarding schools and attend a local community-run school. The Congressional interests thus manifested necessarily oust New Mexico from any activity which burdens this tribal effort to assume control of Federal programs under the Act.[9]

By focusing on the Indian Self-Determination Act much of the presumed uncertainty of the two existing tests (infr-

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in addition to its construction appropriations for administration of this project. It thus bore overhead costs directly from those appropriations, further exacerbating the burdern of the tax in question here.

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9. In arguing that the Federal government has not occupied the field of Indian education, the State makes much of the fact that two-thirds of Indian children in school attend public schools. However, the Federal government pays a large portion of the cost of educating Indian children in public schools both on and off reservations, see *Natonabah v. Gallup-McKinley County School District*, 355 E. Supp. 716 (D.N.M. 1973). But most critically, Federal policy to send Indian children to public schools has changed. Section 1101(d) of Title XI of Pub. L. 95-561, enacted in 1978, now permits tribes to withdraw their children from unresponsive public school districts and compel the BIA to provide schooling in place of the public schools either in a tribal contract school operated under Title I of The Indian Self-Determination Act or in a BIA-operated school. Note also, Section 1101(c) of the Act:

> This paragraph is based upon the special relationship between the Indian nations and the United States and nothing in it shall be deemed to relieve any State of any duty with respect to any citizens of that State.

In any case, when States operate schools within reservations the interplay of tribal as well as State and Federal sovereignties comes into play, creating different roles, responsibilities and privileges. See 25 U.S.C. 231, requiring tribal consent for exercise of State compulsory school attendance laws within reservations.

ingement and preemption) vanishes. Congress itself has fused the two tests, providing "objective criteria" for determining when State action is barred because it impinges upon tribal government,[10] at least when a tribe or tribal organization makes use of the Act's provisions by contracting, as here, for services previously under Federal control.[11]

Thus, the Court may dispose of the case simply by holding that whenever a State significantly impedes a "tribal governmental function" contracted or contractable under the Indian Self-Determination Act, the Act itself determines whether the *Williams* infringement test has been breached, a formulation as precise as any that exists in preemption law.

Alternatively, of course, in addition to the Indian Self-Determination Act, the Indian Trader Statutes, 25 U.S.C. 261 *et. seq.*, serve as a parallel basis for finding the State's tax preempted in this case.[12] However, if the Court

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10. For example, the implementing regulations of the Interior Department contain a detailed definition of "tribal governmental function", 25 CFR 271.2(q).

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11. Lembke is subject to the regulations under Pub. L. 93-638. See Appellants' Brief in Chief 28-31. Because these regulations cover only the activities of subcontractors, not employees, of '638' tribal contractors, there is, moreover, no danger that a ruling in favor of the Board here will prevent States from taxing the incomes of non-Indian employees of tribal organizations. Income taxes are not normally passed on the way that sales taxes are. So there is no reason to conclude that income taxes on non-Indians employed by Indians on reservations would violate either the infringement test, the preemption test, or the fused test discussed here.

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12. New Mexico's contention that the Court lacks jurisdiction over this issue is without merit. New Mexico failed to raise any jurisdic-

wishes, it may also return to a more absolute formulation based either on the Indian Commerce Clause or on an extension of the rule in *McClanahan v. Arizona State Comm'n,* 411 U.S. 164 (1973), Appellants' Brief in Chief 34-39.[13] Any of these approaches results in a decision for the Board.

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tional issue in its Motion to Dismiss or Affirm. The Jurisdictional Statement, however, expressly raised the trader statutes question. It follows that New Mexico invited a decision by this Court on the merits of this question. In any case, if the highest State court has dealt with and decided the validity of a State statute as against a claim that it violates Federal law, the Court will not look any further to see how the issue was raised. *Orr v. Orr,* 440 U.S. 268 (1979). In this case, the New Mexico Court of Appeals held that "the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax", citing *Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967 (10th Cir. 1980), cert. den. 101 S. Ct. 1417 (1981), a case which involved the applicability of the trader statutes to on-reservation construction activities of a non-Indian under contract to a tribal agency. On rehearing the same court held: "Our case does not involve a comprehensive or pervasive scheme of federal regulation of the construction of a school nor does it involve federal regulation similar to the Indian trader statutes." JS 30, 36. In short, the highest State court reviewing the merits dealt with the issue and decided that the State tax statute was valid in spite of Federal laws including the trader statutes. The rule in *Orr* therefore applies. And see, *United States v. County of Allegheny,* 322 U.S. 174, at 192 (1944).

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13. The United States has proposed reinstitution of an absolute rule in cases of this type resting on the Indian Commerce Clause. The recent decision in *Merrion v. Jicarilla Apache Tribe,* Nos. 80-11 and 80-15, _____ U.S. _____, Slip Opinion 22, (Jan. 25 1982) lends some support to the United States' proposal. The Court commented: "To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference, and has not relied on the Clause to authorize tribal regulation of commerce without any constitutional restraints." The passage seems to show a

IV

THE LEGAL INCIDENCE TEST IS INAPPROPRIATE TO STATE-INDIAN TAX CONFLICTS AND SHOULD BE REJECTED BY THIS COURT.

The States suggest that if the BIA had built this school itself by hiring its own contractor instead of contracting with the Ramah Navajo School Board, the Federal government would have had to absorb the tax burden[14] and that it makes no sense to apply a different rule just because an Indian organization enters the picture.

However, even if the proposition about the BIA's constructing the school were true, that fact alone would not justify imposing the burden on this Indian school board. The purposes of the contract with the Board differ

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receptivity to reviving the presumptive force of the Indian Commerce Clause to bar any State activity on a reservation without prior approval of Congress which significantly affects tribal commercial dealings. We agree that such a presumption would produce a workable framework for resolution of disputes of this kind. And we would point out that this argument is functionally equivalent to the Appellants' argument for extension of the *McClanahan* rule to bar State taxes which directly and unavoidably infringe upon the sovereign functions of an Indian tribe. Brief in Chief 34-39.

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14. We of course make no such concession. In fulfilling its special duties to Indians, *U.S. v. Kagama*, 118 U.S. 375 (1886), the BIA is not performing a service directly benefiting the United States as such, but Indian people. For the reasons outlined in this argument the construction of a school for Indian children under a treaty commitment may well absolve the BIA from the tax burden and hence invalidate the tax. For in that case, the tax would conflict with "the performance of a duty" by the Government and would be "a direct interference with the functions of government itself". *James v. Dravo Contracting Co.*, 302 U.S. 134, 157 (1937), as quoted in *United States v. New Mexico*, No. 80-702, Slip Opinion 14 (March 24, 1982).

substantially from those involved either when the government constructs its own facilities by hiring private contractors or when it contracts out the management of a non-Indian government program, as in *United States v. New Mexico, supra.* In neither situation, unlike the present case, is the government's purpose to assist the contractor itself; here its purpose is exclusively to achieve a benefit for Indians by promoting Indian control of governmental programs. Cf. *Morton v. Mancari,* 417 U.S. 535 (1974). Because of this difference, the legal incidence test would be inappropriate to resolution of disputes involving States and Indians, as this Court noted in *Central Machinery,* 448 U.S., at 164, n. 3, when it rejected an Arizona argument that its tax legally fell on a non-Indian.

Nevertheless, the States argue that replacement of the infringement on sovereignty test with the legal incidence test "would go a long way toward clarifying when and how Tribal sovereignty has been infringed". Ans. Br. 15. New Mexico even suggests that the legal incidence rule would "end the anomoly of Indian tribes being more sovereign vis-a-vis the states than the United States itself." *Ibid.*

The major problem with these contentions is their failure to understand the unique relationship between Indian tribes and the United States. As this Court noted in *McClanahan,* 411 U.S., at 172:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.

And see dissent in *Merrion, supra,* Slip Op. at 1.

The issue, therefore, is not whether Indian tribes are to be more sovereign than the United States but how to ensure that the different obligations and interests of the United States regarding Indian tribes (as contrasted within the States) are to be fulfilled. See *Bryan v. Itasca County,* 426 U.S. 373, at 376, n. 2 (1976).

Legal incidence as a test to decide when State tax burdens may be laid upon the United States accommodates the interests of Federal - State comity. So long as Congress retains the power to alter the test by imposing immunity against state taxes on government contractors' receipts, then the democratic interests unique to our federal system are well served. Once again Professor Tribe comments:

> As in eleventh amendment analysis, the issue is essentially one of reconciling competing claims of the states and the national government. Congress, because it represents both state and national interests, is again the most suitable body to make this determination.

L. Tribe, *supra,* at 400. And as this Court said in its unanimous decision in *United States v. New Mexico,* Slip Opinion at 14:

> At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority.

But Indian tribes as such are not represented in Congress. Instead they must rely on a course of dealing with the central government founded on treaties, statutes, and executive treatment. Principles such as legal incidence — which simply establishes a presumption permitting indirect tax burdens to be placed on the United States unless

Congress affirmatively prohibits such burdens[15] — can not be used when the United States by force of treaty, statute, or moral commitment must protect interests beyond its traditional functions vis-a-vis the States in our federation.

For in the Indian context the United States ceases to play the role of partner with States and assumes that of champion for Indians. The United States is under a duty to protect tribal interests. Cf. *Seminole Nation v. United States,* 316 U.S. 286 (1942). For this reason this Court has long held in Indian cases that the usual presumptions applying to Federal-State conflicts do not and should not apply unless Congress specifically so directs.[16] *White Mountain,* 448 U.S., at 143.

Adopting the legal incidence test to resolve disputes of the kind presented here would reverse a century or more of precedents protecting Indian tribes from unauthorized State incursions; and to do so by "refining" the *Williams* test as suggested by the States, would accomplish this reversal *sub silentio.* It would give State foxes the keys to Indian chicken coops by giving States the power by label alone to determine which of their levies could be imposed on reservations with attendant burdens upon Indians.

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15. As for example was the case with regard to contractors to the Atomic Energy Commission. *Carson v. Roane-Anderson Co.,* 342 U.S. 232 (1952). (Indeed 25 U.S.C. 465 and 478b may create a parallel statutory immunity applicable here. See *United States v. Rickert,* 188 U.S. 432 (1903); Cf. *United States v. Mitchell,* 100 S. Ct. 1349 (1980).

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16. Congress on occasion has expressly authorized State taxes on reservation production or activities. See, e.g., 25 U.S.C. 398, 398c, and 399. Congress can thus be presumed to know how to authorize States to levy such imposts when it wishes to do so.

Most importantly, because of the unique legal status of Indian tribes, the States' proposal to have this Court extend the test to apply to State-Indian tax clashes would deprive Congress of its historic policy-making function with regard to Indian matters. It would alter rules vital to continued tribal existence which have both explicit and implicit support from Congress. Reversal of these rules is the prerogative of Congress, not of this Court. U.S. Const., Art. I, §8, cl. 3.

Under these rules, the decision below was clearly in error. The New Mexico Court of Appeals rested its decision in favor of upholding this levy on the same grounds that the Arizona Supreme Court had in *Warren Trading Post Co.*[17] That rationale was decisively rejected by this Court in both *Warren* in 1965 and *Central Machinery* fifteen years later. See *Central Machinery,* 448 U.S., at 164, n. 3. New Mexico's tax has burdened Navajo self-government and a specific congressional purpose by depleting resources furnished by Congress to construct a reservation school for Navajo children. The tax thus conflicts with the New Mexico Enabling Act, 36 Stat. 558-559; N.M. Const., Art XXI, §2,[18] the Navajo Treaty, the Indian Self-Determination Act, the Indian Trader Statutes, and the specific construction appropriations made by Congress directly to this remote Navajo community school board.

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17. *Warren Trading Post Co. v. Moore,* 95 Ariz. 110, 387 P. 2d 809 (Ariz. 1963).

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18. Disclaimer clauses in State enabling acts similar to New Mexico's have recently been held to bar State jurisdiction over adjudication of tribal water rights. *Northern Cheyenne Tribe v. Adsit,* 668 F. 2d 1080 (9th Cir. 1982); *San Carlos Apache Tribe v. Arizona,* 668 F. 2d 1093 (9th Cir. 1982); and *Navajo Nation v. United States,* 668 F. 2d 1100 (9th Cir. 1982).

In short, the opinion below has ignored the uniform precedents of this Court and must be reversed.

CONCLUSION

For the foregoing reasons, Appellants pray for an order reversing the decision below and remanding with instructions that the court below enter judgment for Appellants with explicit directions that the Appellee Bureau of Revenue be ordered to refund, with interest from date of assessment, the taxes which have been illegally collected, and for such other and further relief as the Court deems appropriate.

Respectfully Submitted:

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmberg and Gross
P.O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988 8979

Counsel for Appellants,
Ramah Navajo School Board, Inc.
and Lembke Construction Co., Inc.

Of Counsel:
Neal A. Jackson
April 1982.

APPENDIX A

Excerpt from "A Checklist of New Mexico State & Local Taxes, Permits & Licenses", Undated, Tax Research and Statistics Office Taxation and Revenue Department, P.O. Box 630, Santa Fe, New Mexico 87509.

Collected by: Revenue Division
Taxation & Revenue Department

* * * *

GROSS RECEIPTS TAX—An excise tax of 3.5% of gross receipts is imposed for the privilege of doing business in New Mexico. The tax is broadly based and is imposed on services as well as sales and leases of tangible personal property. Various deductions are authorized; some activities and industries are exempt, part of these by virtue of their taxation under other laws. Exemptions include wages, certain agricultural products, dividends and interest, and gas, oil and mineral extractions. Although this tax is imposed on the seller (unlike a sales tax which is imposed on the buyer), it is customary to pass such tax on to the buyer making it a general sales tax in effect. The gross receipts tax was reduced from 3.75% to 3.5% by the 1981 Legislature.

Collected by: Revenue Division
Taxation & Revenue Department

* * * *

MOTION FILED
JAN 25 1982

No. 80-2162

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC.,
AND
LEMBKE CONSTRUCTION CO., INC.,
Petitioners,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondents.

Motion & BRIEF *AMICUS CURIAE*
OF
ASSOCIATION ON
AMERICAN INDIAN AFFAIRS, INC.,
IN SUPPORT OF PETITIONERS

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae

Of Counsel:
S. BOBO DEAN
KENNETH J. VANDEVELDE

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

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AND
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v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 36.3, the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, moves the Court for leave to file the attached brief *amicus curiae* in support of petitioners in the above-captioned case. The petitioners, Ramah

Navajo School Board and Lembke Construction Company, have consented to the filing of this brief; the respondent, the State of New Mexico, has refused so to consent.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), and *Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

The Association, moreover, historically has taken a special interest in the areas of Indian education and child welfare. In 1969 and again in 1974, for example, the Association conducted studies of the off-reservation placement of Indian children which led to the Congressional hearings that resulted in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* See H. Rep. No. 1386, 95th Cong. 2d Sess. 9 (1978). Furthermore, the Association assisted in the presentation of information to the Congress concerning proposed legislation which ultimately became the Indian Self-Determination and

Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* and the Education Amendments of 1978, 25 U.S.C. §§ 2001 *et seq.*

This case presents a question of great and continuing concern to the Association and to Indians generally throughout the United States—whether states may impose taxes in an area of Indian activity which has been preempted by a pervasive scheme of federal law and regulation. In the present case the Association is concerned with this broad issue in a specific context—namely, whether the State of New Mexico, consistent with the precedents established by the Supreme Court, may tax school construction activities in Indian country.

If the New Mexico Supreme Court's decision is not reversed, the effects on Ramah Navajos and Indians generally will be significant and deleterious. More specifically, affirmance of the decision below would seriously burden the efforts of Indian tribes to achieve self-determination in the area of Indian child welfare and education, and also would impair the attempts of the Congress and the Navajo Tribe to replace existing boarding schools with day schools located near the children's homes.

The Association submits the attached brief in order to assist the Court in recognizing that New Mexico's gross receipts tax as applied to the Ramah Navajo School is preempted by a pervasive federal statutory scheme governing Indian child welfare and education which strongly favors family and community control over Indian education. Because of the Association's deep interest in Indian child welfare and its national constituency, these points are not likely to be covered or to be approached in identical fashion in the brief submitted by petitioners Ramah Navajo School Board and Lembke

Construction Company. Accordingly, the Association requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae

Of Counsel:

S. BOBO DEAN
KENNETH J. VANDEVELDE

IN THE

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OCTOBER TERM, 1981

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AND
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BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondents.

INTEREST OF *AMICUS CURIAE*

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The Association, moreover, historically has taken a special interest in the areas of Indian education and child welfare. In 1969 and again in 1974, for example, the Association conducted studies of the off-reservation placement of Indian children which led to the Congressional hearings that resulted in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* See H. Rep. No. 1386, 95th Cong. 2d Sess. 9 (1978). Furthermore, the Association assisted in the presentation of information to the Congress concerning proposed legislation which ultimately became the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* and the Education Amendments of 1978, 25 U.S.C. §§ 2001 *et seq.*

This case presents a question of great and continuing concern to the Association and to Indians generally throughout the United States—whether states may impose taxes in an area of Indian activity which has been preempted by a pervasive scheme of federal law and regulation. In the present case the Association is concerned with this broad issue in a specific context—

namely, whether the State of New Mexico, consistent with the precedents established by the Supreme Court, may tax school construction activities in Indian country.

If the New Mexico Supreme Court's decision is not reversed, the effects on Ramah Navajos and Indians generally will be significant and deleterious. More specifically, affirmance of the decision below would seriously burden the efforts of Indian tribes to achieve self-determination in the area of Indian child welfare and education, and also would impair the attempts of the Congress and the Navajo Tribe to replace existing boarding schools with day schools located near the children's homes.

In order to avoid needless repetition, and to facilitate the consideration of materials which otherwise might not be brought to the Court's attention, the Association has chosen to address an issue which is not likely to be discussed as extensively or in identical fashion in the brief submitted by the Ramah Navajo School Board and Lembke Construction Company. Specifically, the attached brief is submitted to assist the Court in recognizing that New Mexico's gross receipts tax as applied to the Ramah Navajo School is preempted by a pervasive federal statutory scheme governing Indian child welfare and education which strongly favors family and community control over Indian education.

STATEMENT OF THE CASE

In 1968, the State of New Mexico permanently closed the only public high school which was accessible to the children of the Ramah Navajo Chapter. The closing of that high school left the children of Ramah only one alternative, if their formal education was to continue:

attendance at one of the numerous Federal Indian boarding schools located anywhere from hundreds to thousands of miles away from home.

In an effort to prevent the separation of the Ramah Navajo children from their families and community, the Ramah Navajo Chapter organized a school board and determined to build a Chapter-managed school to replace the one closed by the State. Using funds contributed by the Navajo Tribal Council, the Ramah Chapter opened its school in the abandoned public high school building in 1970. Four years later, Congress enacted a bill appropriating monies for design and construction of the school, which was augmented by three subsequent appropriations bills. Public Law 93-245, 87 Stat. 1073; Public Law 93-404, 88 Stat. 810; Public Law 94-165, 89 Stat. 985; Public Law 95-74, 91 Stat. 293. In accordance with Congressional intentions, the funds were provided directly to the Ramah Navajo School Board for administration under a contract with the Bureau of Indian Affairs.

Only two builders submitted bids to construct the new Ramah Navajo School. The low bidder required as a condition of entering into a construction contract that the School Board reimburse the builing contractor for the full amount of all taxes. The School Board yielded to the low bidder's terms, and construction commenced.

During the course of construction, which extended over a period of years, New Mexico assessed against the building contractor a gross receipts tax which, by the date of the trial in this action, had amounted to $232,264.38. Pursuant to its contract with the building contractor, the Ramah Navajo School Board has paid the full amount of the tax. That tax is the subject of this action.

Having no other source of payment, the School Board has deducted the amount of the gross receipts tax from the total amount appropriated by Congress for design and construction of the new Ramah Navajo School. As a result, the new school is a significantly diminished version of the school originally contemplated and funded by Congress. Specifically, the school as constructed lacks certain classrooms included in the initial design and operates a cafeteria in space originally intended to house a vocational education program. The School Board also now is unable to afford certain other portions of the design, including administrative quarters and landscaping.

ARGUMENT

THE IMPOSITION OF THE GROSS RECEIPTS TAX ON CONSTRUCTION OF THE RAMAH NAVAJO SCHOOL IS PREEMPTED BY FEDERAL POLICIES CONCERNING INDIAN CHILD WELFARE AND EDUCATION.

A. Congress' Plenary Power Over Indian Affairs Preempts State Taxation Of An Indian Activity Where The Tax Burdens A Pervasive Federal Policy And The State Cannot Justify Any Such Burden.

The Indian Commerce Clause grants to Congress plenary authority over Indian affairs. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *United States v. Kagama,* 118 U.S. 375 (1886); *Worcester v. Georgia,* 31 U.S. 515 (1832). This broad federal power over Indian affairs, under certain circumstances, preempts the exercise of state regulatory jurisdiction over Indian tribes. *See, e.g., Central Machinery Company v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980);

and *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685 (1965).

Slightly more than a year ago, this Court set forth in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), certain criteria which, if satisfied, would dictate a finding that state taxation of activities on an Indian reservation involving non-Indians has been preempted by an exercise of Congress' plenary power over Indian affairs. In that case, the Court held that federal preemption would be found where (1) federal regulation of an activity was pervasive; (2) the tax burdened the policies underlying federal regulations; and (3) the state could not justify the tax apart from its generalized interest in raising revenue.

B. Congress Has Created A Pervasive Federal Policy Regarding Indian Child Welfare and Education.

During the past fifteen years, Congress repeatedly has affirmed, with both pen and purse, a comprehensive federal policy governing the education and welfare of Indian children. As will be shown below, that policy strongly favors the preservation and stability of Indian family, community and tribal life. More specifically, federal policy seeks to insure that Indian children remain in the custody, and are educated under the supervision, of their families and communities.

Current federal policy toward the education and welfare of Indian children is rooted in Congressional hearings and legislation which began in 1967. Senate Resolution 165, adopted on August 31, 1967, authorized "a complete study of any and all matters pertaining to the education of Indian children," to be conducted by a Special Subcommittee on Indian Education.

This painstaking study, which finally was completed on November 3, 1969, concluded that our national policies for educating Indian children were "a failure of major proportions." S. Rept. 501, 91st Cong. 1st Sess. XI (1969). The Subcommittee attributed the failure in large part to the divorce of Indian education from Indian community participation and control. One of the most destructive elements of this divorce was the widespread practice of sending Indian children, at very young ages, to distant boarding schools where they would be raised without the support and identity of their families and culture.

The removal of Indian children to boarding schools was found by the Special Subcommittee to be particularly serious among the Navajo:

> As early as its first hearings in December of 1967, the Subcommittee was informed that 7,476 Navajo children, ages 9 and under, were in 48 elementary boarding schools, on the Navajo Reservation. Although there are special educational and social reasons for placing children in boarding schools, in this case it was simply a matter of not having a day school (public or Federal) available.

Id. at 67. The Subcommittee noted that the boarding schools:

> have been severely criticized as cruel and reprehensible and expert witnesses have established that they damage both the children and the Navajo family structure.

Id. at 161. Thus, Recommendation 22 of the Subcommittee was that the elementary boarding schools on the Navajo Reservation be replaced by day schools "as rapidly as possible." *Id.* at 123.

The Special Subcommittee issued some 60 recommendations covering all phases of Indian education. But these 60 recommendations were reducible to a single broad principle:

> One theme running through all our recommendations is increased Indian participation and control of their own education programs. For far too long, the Nation has paid only token heed to the notion that Indians should have a strong voice in their own destiny.

Id. at XIII-XIV. Thus, the Special Subcommittee announced a new national policy that Indian education be returned to the community, and that Indian children be returned to their homes.

The return of Indian child welfare and education to community control quickly was adopted as policy by the Nixon Administration. The following year, in a special message to Congress on Indian policy, President Nixon declared that

> Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools.

H. Doc. 363, 91st Cong. 2d Sess. 6 (1970). In that same message, the President specifically cited the newly formed Ramah Navajo School as a "notable example" of the new policy in action. *Id.* Two years later, Commissioner of Indian Affairs Louis R. Bruce announced that, by 1976, the BIA intended to transfer at least half of all BIA schools to Indian control. L. Bruce, The Bureau of Indian Affairs 243 (1972).

Although the process of transferring Indian child welfare and education to community control had been

underway for several years, Congress gave formal sanction to that process in 1975 with the enactment of the Indian Self-Determination and Educational Assistance Act, Public Law 93-638, 88 Stat. 2206. In that Act, Congress found that "parental and community control of the educational process is of crucial importance to the Indian people." 25 U.S.C. § 450(b)(3). The Act authorized the Secretary of the Interior to enter into contracts with Indian tribes under which the tribes would assume control of education programs on the reservation. 25 U.S.C. § 450f.

Three years later, in 1978, Congress again enacted legislation to foster the return of Indian children to their communities, while encouraging the stability of Indian families. The Indian Child Welfare Act, Public Law 95-698, 92 Stat. 3069, granted to tribal courts jurisdiction exclusive of any state over Indian child custody proceedings and authorized grants to Indian tribes to conduct Indian child and family service programs. 25 U.S.C. §§ 1911.

The legislative history of that Act reflects the Congressional judgment that educational policies which remove an Indian child from his or her community have a devastating effect on Indian family and tribal life. The House Report found that the use of boarding schools on the Navajo Reservation remained a public scandal:

> The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.
>
> * * *
>
> The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional

> facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K-12, live at boarding schools.

H. Rep. 1386, 95th Cong. 1st Sess. 9 (1978). In an effort to bring an end to the wholesale institutionalization of Indian children, Congress ordered the Secretary of the Interior to prepare a report on the feasibility of providing all Indian children with schools located near their homes and to submit the report to Congress no later than November 8, 1980, 25 U.S.C. § 1961(b).

The Congressional call for the use of day schools rather than boarding schools was echoed by the BIA. On February 2, 1977, a BIA official told the House Subcommittee on Elementary, Secondary and Vocational Education that "Current Bureau of Indian Affairs policies require day school attendance if the student can be reached by bus regardless of the circumstances." Indian Education, Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor, 95th Cong. 1st Sess. 96 (1977) (Statement of Mr. Larry D. Holman).

Congress took yet another step toward the restoration of Indian child welfare and education to family and community control with the passage of The Education Amendments of 1978, Public Law 95-561, 93 Stat. 2321. Section 1130 of that Act once again committed the federal government to a policy of Indian control, stating that

> It shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian

> control of Indian affairs in all matters relating to education.

25 U.S.C. § 2010. The Amendments also required the Secretary of the Interior to adopt, by November 1, 1979, a statement of policies which would serve as "the foundation for future Bureau actions in education." 25 U.S.C. § 2013.

The Secretary published the final language of the Congressionally mandated regulations on October 2, 1979. These policies, which were codified at 25 C.F.R. Part 31a, reflect the federal government's continuing commitment to family and community participation in Indian child education. For example, Section 31a(e) requires that the Assistant Secretary for Indian Affairs

> Promote, respect and defend the cohesiveness and integrity of the family, and Tribal and Alaska Native community, as they relate to the educational and social prerogatives of the Tribes and Alaska Native entities.

Similarly, Section 31a(i) provides that the Assistant Secretary shall

> Afford Indian and Alaska Native students the opportunity to attend local day schools and other schools of choice and the option to attend boarding schools when the student and parent or guardian determine it is in the student's best interest and consistent with the Indian Child Welfare Act of 1978. . . .

Congress has continued to mandate adherence to its policy of family and community control over Indian education, particularly with regard to boarding schools on the Navajo Reservation. In its report on the Department of the Interior and Related Agencies Appropriations Bill for Fiscal Year 1981, the House Committee on

Appropriations directed the BIA to develop a plan to curtail the use of boarding schools on the Navajo Reservation:

> The Committee is concerned about the continual movement of Navajo Indian children over long distances for education at boarding schools and the impact this has on families and communities involved. Because of this concern, the Committee directs the Secretary of the Interior to deliver within 120 days a plan showing the cost to develop a system of K-8 day schools within fixed boundaries on the Navajo Reservation. The 9-12 schools, served by these elementary schools, shall also be identified within fixed enrollment boundaries. . . . In the interim, the Committee hereby directs that no additional funds will be provided for the expansion or replacement of boarding schools and dormitories beyond the fiscal year 1981 budget. . . .

H. Rept. 1147, 96th Cong. 2d Sess. 43 (1980). The House Committee on Appropriations reaffirmed its position in its report on the Department of the Interior and Related Agencies Appropriations Bill for Fiscal Year 1982. H. Rept. 163, 97th Cong. 1st Sess. (1981).

The entire corpus of relevant federal statutes, regulations, and appropriations during the past fifteen years evidences a consistent and pervasive policy in favor of preserving Indian family, community and tribal life. In accordance with that policy, Congress steadfastly has sought to insure that Indian children are educated in day schools under the supervision of their families and communities, not in distant boarding schools.

C. Congress' Pervasive Federal Policy Regarding Indian Child Welfare And Education Preempts The New Mexico Gross Receipts Tax As Applied To The Ramah Navajo School.

Unquestionably, the federal statutes and regulations outlined above preempt the application of New Mexico's gross receipts tax to the construction of the Ramah Navajo School. These statutes and regulations create a pervasive federal policy to promote the stabilty of Indian families and tribes by insuring Indian control over and participation in Indian education and, more particularly, by providing for the education of Indian children in day schools located near their homes.

The decision by the State of New Mexico to close its public high school in the Ramah Navajo Chapter dealt a painful blow to this federal Indian child welfare and education policy. Initially, New Mexico's decision appeared to necessitate that the Ramah Navajo children be sent off to distant boarding schools—a practice which has been especially notorious and destructive on the Navajo Reservation.

Fully in accordance with federal policy, however, the Ramah Navajo Chapter undertook to finance and build a community operated day school which would permit their children to continue their education under the supervision of their parents and community. In further pursuit of the federal policy, Congress on four separate occasions enacted legislation to fund the Ramah Navajo School. As already noted, the Ramah Navajo School since its funding has been regarded as a leading example of the federal Indian child welfare and education policy in successful operation.

The gross receipts tax imposed by the State of New Mexico burdens and obstructs the federal policy of educating Indian children in day schools under the watchful eye of family and community. Already the tax has resulted in the availability of fewer classrooms, the loss of space for a vocational education program, and reductions in funds for school administration. The State of New Mexico, not satisfied with having created an educational crisis in the Ramah Navajo district, now seeks to cripple the federal and tribal solution to that crisis.

Moreover,

> This is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations. . . .

White Mountain Apache Tribe v. Bracker, 448 U.S. at 150. The Court's observation in *White Mountain Apache Tribe* applies with even greater force here. New Mexico's gross receipts tax is not justified by a particular service rendered by the state on behalf of the Ramah Navajo School Board. Indeed, it is precisely because New Mexico *refuses to provide services* for the Ramah Navajo children that the Chapter school is necessary.

New Mexico's gross receipts tax, then, satisfies all of the requirements of preemption established by *White Mountain Apache Tribe*: (1) the existence of a pervasive federal policy; (2) a state tax which burdens that policy; and (3) the absence of a justification for the tax other

than a general interest in raising revenue. In the words of this Court,

> Where, as here, the Federal Government has undertaken comprehensive regulation . . . where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

448 U.S. at 151.

CONCLUSION

In a scant fifteen years since the Senate Special Subcommittee issued its report on Indian Education, Congress has enacted three major pieces of legislation involving Indian child welfare and education policy. This new policy—which literally has revolutionized Indian education—demands that Indian children be educated under the supervision of their families and community, rather than in distant boarding schools.

Ironically, even as the Special Subcommittee was calling for a national commitment on the scale of the Marshall Plan to rebuild the Indian education program, the State of New Mexico was abandoning its commitment to the Ramah Navajo children. Those children, however, fared much better than the 90 percent of their brothers and sisters who wound up in Indian boarding schools. Pursuant to the new federal policy, Congress agreed to fund a community controlled school at Ramah Navajo Chapter.

New Mexico now has imposed a gross receipts tax on the construction of the school at Ramah. If the tax is allowed to stand, the Ramah Navajo School will be sig-

nificantly smaller both in size and in curriculum than the school funded by Congress. New Mexico imposed this tax in pursuit of no legitimate regulatory objective and only months after eliminating public secondary education in the Ramah Navajo Chapter. Such an exercise of the state taxing power is constitutionally impermissible.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W
Washington, D.C. 20037
Attorney for Amicus Curiae

Of Counsel:

S. BOBO DEAN
KENNETH J. VANDEVELDE

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ALEXANDER L. STEVAS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

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and
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Appellants,

v.

BUREAU OF REVENUE, STATE OF
NEW MEXICO,

Appellee.

ON APPEAL FROM THE COURT
OF APPEALS OF NEW MEXICO

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE

GEORGE DEUKMEJIAN,
Attorney General

NEAL J. GOBAR,
Deputy Attorney General

110 West "A" Street,
Suite 700
San Diego, California 92101
Telephone: (714) 237-7308

Attorneys for Amicus Curiae
State of California

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INTEREST OF AMICUS

There are a substantial number of Indian reservations and tribal Indians in the State of California. California has been and is involved in litigation over limitations on California's power to tax non-Indians buying cigarettes (The

Chemehuevi Indian Tribe v. California State Board of Equalization, U.S.D.C., ND Cal. No. C77-2838-REP) or otherwise doing business with Indians on Indian land. (See e.g., Fort Mojave Tribe v. San Bernardino County 543 F.2d 1253 (1976); Agua Caliente Band of Mission Ind. v. County of Riverside 442 F.2d 1184 (1971).)

Much valuable Indian land is the subject of commercial development in California. Alternating sections underlying the City of Palm Springs, California, are Indian lands. (See Agua Caliente Band etc, supra, at p. 1185.) Much of this Indian land has been and is being leased long-term to non-Indian developers and businesses. Major stores and other businesses owned and operated by non-Indians, located on Indian land, serve the same mostly non-Indian general public, receive the same benefits from the State

of California, and should pay the same taxes to the State of California as their competitiors in the next block who are not located on Indian land.

California is particularly concerned with ramifications of suggestions that state taxes, the legal incidence of which is on non-Indians who enjoy the benefits of state government, is prohibited because the ultimate economic burden of the tax may be contractually passed on to the Indian consumers or Indian property owners.

CALIFORNIA CONCURS WITH MONTANA, ARIZONA AND WASHINGTON

While time has not permitted thorough review of the final Amicus Curiae brief to be submitted by Montana, Arizona and Washington, California generally concurs in their arguments (so will try not to repeat them here).

"LEGAL INCIDENCE" SHOULD BE THE GENERAL TEST OF TAXATION OF NON-INDIANS DOING BUSINESS WITH INDIANS OR ON INDIAN-OWNED LAND

"Legal incidence" as used by this Court in a number of cases[1] is a clear, definitive and workable test of who pays a tax. Legal incidence is determined by the taxing authority. On

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1. Many deal with tax on the United States itself. (See Alabama v. King & Boozer (1941) 314 U.S. 1; First Agricultural Nat. Bank v. Tax Comm'n, 392 U.S. 339 (1968); W. M. Gurley v. Arny Rhoden, Etc (1975) 421 U.S. 200; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599.) Federal attorneys, however, are trying to get this Court to return to an economic burden test, eliminating "legal" from the test and invalidating state taxes where all legal obligations and incidents of the tax are on the taxable persons and the parties shift by contract the economic burden to a tax immune entity. (See Cal.State Board of Equalization v. U.S.A., appeal to U.S. Supreme Court pending, #81-1000.) Here the federal government provided the funds (Ramah Navajo School Bd. v. Bureau of Revenue N.M., N.M. App., 625 P.2d 1225 at p. 1227), and thus bears the actual economic burden.

the other hand, the "economic burden" of every tax is normally passed along as part of the price of a product or service to the ultimate purchaser or user. The manner, extent and form by which this occurs is subject to the contractual arrangements and economic bargaining situations of the parties. States have little, if any, control over the power of private parties to characterize and shift the (apparent or real) burden of a tax. Thus, private parties can manipulate the apparent (and probably real) economic burden. Where "economic burden" is a substantial or primary consideration in determining immunity from a tax, the contracting parties can manipulate their contractual relations and create immunities thereby.

Thus, in the instant case, the economic burden of state and local taxes

imposed by another state on the manufacturer of electrical fixtures manufactured outside New Mexico and used by appellant Lembke in the contract in issue here, is just as much on the Indian appellant as is the tax in issue. Should all such taxes be prohibited? Where is the "economic burden" line to be drawn?

Here the federal government provided all the funds (Ramah Navajo School Bd, etc., supra, 625 P.2d at p. 1227), and thus, bore the real burden of the state tax in issue. Federal funds probably bear much of the expenses paid by Indians including any state tax which is part of the price. This is further reason for applying the same "legal incidence" test when dealing with Indians on reservations as applied when dealing with the United States itself.

This Court should consider that reservation Indians, especially in California, are less and less isolated from activities of non-Indians off the reservations; the younger Indians are increasing their participation in normal state and local activities and are taking advantage of more and more benefits offered by state and local governments. Barriers should not be erected, and ancient animosities exacerbated by unnecessarily treating indians differently from other citizens.

The taxpayer here, Lembke, clearly receives full benefit of New Mexico state and local government. He should pay his taxes like anyone else. The fact that his costs of doing business, including his taxes, are passed on as part of his price to his customers, should not excuse his payment of such tax because his customer here is a tax exempt Indian

group (which is not itself taxable), and the final construction activities are performed on Indian land.

CONCLUSION

The state tax in issue on a non-Indian who receives substantial benefits from the state is not invalid because the economic burden was contractually passed on to Indians.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

By: _____
NEAL J. GOBAR,
Deputy Attorney General

Attorneys for State of California

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BRIEF OF THE STATES OF MONTANA, ARIZONA, NEVADA, WASHINGTON, MINNESOTA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF THE STATE OF NEW MEXICO

March 15, 1982

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General for the State of Montana
P. O. Box 8032
Missoula, Montana 59807
Telephone: (406) 728-0921
Attorneys for the State of Montana

IAN A. MacPHERSON
Chief Counsel, Tax Division
Office of the Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona 85007
Attorney for the State of Arizona

(List continued on inside of cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

LELAND T. JOHNSON
Assistant Attorney General
of the State of Washington
Temple of Justice
Olympia, Washington 98504
Attorney for the
State of Washington

WARREN SPANNAUS
Attorney General of the
State of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
Attorney for the
State of Minnesota

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501
Attorney for the
State of South Dakota

RICHARD H. BRYAN
Attorney General of the
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
Attorney for the
State of Nevada

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BRIEF OF THE STATES OF MONTANA, ARIZONA, NEVADA, WASHINGTON, MINNESOTA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF THE STATE OF NEW MEXICO

INTERESTS OF AMICI

Pursuant to Rule 36 of the Supreme Court Rules the States of Montana, Nevada, Arizona, Washington, Minnesota, and South Dakota file this brief as *amici curiae* in support of Appellee.

The States which join in this brief have within their borders large Indian reservations and significant numbers of Indian citizens.[1]

Tribal members and non-members live on each reservation. Tribes and tribal members enter into innumerable business transactions with non-members and non-Indian entities. In recent years, the Indian tribes located within the *Amici* states have increased their economic activities on their reservations. At the same time, the tribes have also increased their business relations with non-Indians both on and off the reservation. This presents numerous actual and potential problems.[2]

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1. For example, the State of Montana has seven Indian reservations which together comprise 5.5 per cent of the total land within Montana. There are approximately 5,148,000 acres of tribal land and allotted individual land. T. Taylor, *THE STATES AND THEIR INDIAN CITIZENS*, 179 (1972).

There are twenty-three Indian reservations in the State of Washington. School population figures show that as of October 1, 1980, the total number of Indian students in the State's K-12 public school system numbered approximately 19,641. Of this number, approximately 13,395 resided on Indian Reservations.

Arizona has the largest population of reservation Indians of any state of the Union. Nearly one-third of all Indian Trust lands in the United States lie within the State of Arizona, covering nearly twenty million acres, or almost 27 per cent of the State's area. The two largest metropolitan areas in Arizona, Phoenix and Tucson, lie in close proximity to, and in certain areas are adjacent to, Indian reservations.

2. One example of such a problem in Arizona is representative. There, in mid-1981, it was announced that a combination retail-industrial project with an estimated cost of 400 million dollars was to be constructed on the Salt River Indian Reservation immediately east of the Phoenix-Scottsdale area. Accompanying the announcement of the project was a representation that the persons who built upon the reservation or did business thereon would be exempt from State taxation.

All of the *Amici* have numerous non-discriminatory taxes which are imposed upon all of their citizens, unless they are entitled to exemption. Since *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), the States have recognized that reservation Indians, tribes, and tribal or trust lands, and certain kinds of personal property owned by the tribes or by individual Indians are exempt from taxation. The States, however, have consistently asserted their authority to tax non-Indians, including non-Indian entities doing business with tribes within the exterior boundaries of their reservations.

Since *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), there has been a continuum of litigation in which the various Indian tribes have challenged the rights of the States to collect numerous taxes. Several of those cases have involved Indian tribes' contentions that the States may not collect taxes from non-Indian entities which are doing business with the tribes on their own reservations.[3]

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3. The State of Montana's pending cases include: *Crow Tribe of Indians, et al. v. State of Montana, et al.*, — F. 2d — (9th Cir. July 13, 1981), *petition for rehearing denied*, January 5, 1982. The Crow Tribe challenged Montana's authority to collect its coal severance tax (Montana Code Annotated [hereinafter M. C. A.] §§ 15-35-101 through 15-35-110) and gross proceeds from coal tax (M. C. A. §§ 15-23-701 through 15-23-704) from non-Indian coal producers mining off-reservation coal in which the tribe claims beneficial interest. The case has been remanded to the United States District Court for the District of Montana for trial in light of the opinion of the Ninth Circuit Court of Appeals. Over $35,000,000 in taxes are at stake.

Blackfeet Tribe of Indians v. Groff, et al., No. CV-78-61-GF (D. Mont. 1981), (pending 9th Cir. No. 81-3041). The Blackfeet

(Continued on next page)

The *Amici* States have a vital interest in any case involving the States' right to tax non-Indians doing business with Indian tribes. The case before this Court presents an opportunity for the Court to decide the question of whether States will be able to continue to impose any tax upon non-Indians doing business with Indians or Indian tribes on their reservation.

ARGUMENT

I.

The states must be allowed to impose their taxes upon non-Indians doing business with Indians.

The States must be allowed to continue to tax non-Indian property or activities within a reservation. This

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(Continued from previous page)

Tribe challenged the right of the State of Montana to impose its five oil and gas production taxes upon non-Indian producers leasing lands in which the Blackfeet Tribe has a beneficial interest. This case involves over $6,000,000 in taxes collected from producers pursuant to the Resource Indemnity Trust Tax, M. C. A. § 15-38-104, Producer's License Tax, § 84-2202 Revised Codes of Montana, 1947, Oil & Gas Severance Tax, M. C. A. § 15-36-101, M. C. A. Oil & Gas Conservation Tax, M. C. A. § 82-11-131, and Oil & Gas Net Proceeds Tax, M. C. A. § 15-23-601.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, et al., v. The State of Montana, et al., (D. Mont. No. CV 81-8-GF). The Tribes challenge the right of the State of Montana to collect its sales tax for new motor vehicles, (M. C. A. §§ 61-3-502 and 61-3-303(2)(b)) and the motor vehicle personal property tax required for licensing vehicles in Montana, (M. C. A. §§ 61-3-503 and 61-3-504).

Court has recognized the right of a State to impose taxes upon and otherwise regulate the affairs of non-Indians doing business on an Indian reservation, this even when the person or property taxed or regulated had a direct connection with an Indian tribe and tribal property on reservation, and despite the fact that the tax had a direct economic impact upon tribal government or programs. *Thomas v. Gay*, 169 U. S. 264 (1898) (state could tax non-Indian owned cattle grazing on reservation); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation*, 425 U. S. 463 (1976) (state could require Tribes to collect tax on sales of cigarettes to non-Indians from tribally licensed "smoke shops"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980) (state could collect tax on sales of cigarettes to non-Indians and non-members of the Tribes).

Not only has this Court recognized the rights of states to impose their taxes upon non-Indians who do business with Indian tribes on reservations, but this Court has expressly limited the exemptions from state taxes to on-reservation enrolled members of a tribe living on their own reservation or to tribal or trust properties. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U. S. 463 (1976); *Bryan v. Itasca County*, 426 U. S. 373 (1976); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980). In each of these cases, this Court implicitly used the legal incidence test despite the fact that Indians and Indian property were involved. In each case this Court determined that the State was precluded

from exercising its otherwise valid taxation powers only in those situations where the incidence of the challenged taxes fell upon reservation Indians or their on-reservation property.

Appellants argue that the New Mexico Gross Receipts Tax creates an economic burden upon the Ramah Navajo School Board, and Appellants suggest that the incidence of the tax is shifted from Lembke Construction Co. to the Ramah Navajo. Such an argument is directly contrary to the clear, longstanding rule of this Court that passing on the *economic* burden of a tax to one who has no legal obligation to either pay the tax or reimburse the taxpayer does not shift the incidence of the tax to one who bears the burden. Certainly, liability for actual payment of the tax to a government does not always coincide with the legal incidence of the tax. However, legal incidence of the tax will fall upon the person or entity liable for actual payment of the tax except when the tax itself *clearly and unavoidably requires the taxpayer to pass the tax onto another. Alabama v. King & Boozer,* 314 U. S. 1 (1941); *United States v. City of Detroit,* 355 U. S. 466, 473 (1958); *American Oil Co. v. Neill,* 380 U. S. 451 (1965).

Historically, this Court has examined states' taxation schemes in order to determine whether or not the incidence of the tax involved shifted from the taxpayer to another. *First Agricultural Bank v. Tax Commission,* 392 U. S. 339 (1968); *United States v. Mississippi Tax Commission,* 421 U. S. 599 (1975). This Court has held that the legal incidence of a federal excise tax did not shift from the gasoline distributor to the consumer where "no statute *required* petitioner to pass the tax on to a purchaser-consumer." [Emphasis supplied.] *Gurley v. Rhoden,* 421

U. S. 200, 204 (1975). The legal incidence did not shift even though there was supplemental state law which "provided only that the excise tax *'may be passed on to the ultimate consumer. . . .'*" [Emphasis in original.] 421 U. S. 200, 206, n. 6.

The legal incidence test has long been used in non-Indian context because it provided the only mode of analysis yielding predictable, rational and workable results in challenges to tax statutes. It is the only method by which to identify what person or entity has an interest in the taxation sufficient to justify a complaint and obtain a remedy. When used in the Indian-related cases cited above, and in this case, the test is equally appropriate. This Court should reject the substitution of the economic burden test for the long used legal incidence test.

II.

The abandonment of the legal incidence test in Indian cases yields absurd results.

In recent years, there has been a concerted attempt by Indian tribes to eliminate the use of the legal incidence test by arguing that, although the incidence of a challenged tax might fall upon a non-Indian who actually paid the tax, the tax was nonetheless invalid. A frequently used argument was that the economic effect of the tax devastated tribal revenues, and thus interfered with tribal self-government. The economic effect, it was argued, somehow shifts the incidence from the taxpayer to the tribe which was detrimentally affected. The second argument was that the existence of a tribal tax preempted the authority of a state to tax the same product or activity. Finally, it was argued that the existence of federal regu-

lations pertaining to a certain activity defeated the authority of the state to impose any tax upon the regulated activity. These arguments were most extensively considered by this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra.* After explicitly finding that the challenged taxes fell upon the non-Indian purchaser of cigarettes this Court rejected the attempt of the Tribes to avoid the legal incidence test. Instead, this Court upheld the right of the State of Washington to impose taxes upon non-Indian consumers of cigarettes, notwithstanding the devastating economic effect upon the tribal revenues, and notwithstanding the existence of tribal cigarette taxes, which the Tribe argued had been federally approved and therefore constituted a federal preemption.

In the case before this Court, the Ramah Navajo School Board and Lembke Construction Company, as well as the United States by its memorandum as *amicus curiae,* all seek to have this Court read the single case of *White Mountain Apache Tribe v. Bracker,* 448 U. S. 136 (1980) to undo the traditional tax analysis of previous years, and to extend unprecedented tax immunities to non-Indians doing business with Indian tribes. *Bracker* neither overruled the previous cases nor reconciled them in its analysis. Appellants now ignore the unique factual circumstances of *Bracker* and rely upon broad language contained in the Court's opinion in *Bracker* to yield absurd results.[4]

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4. As is argued in part III of this brief, Bracker also troubles both the United States and *Amici* States because it requires constant judicial weighing of competing interests of the United States, the Tribes and the States.

The arguments made by the United States and by appellants in this case would inevitably deprive the states of their rights to impose non-discriminatory taxes for purposes of general revenue raising, and would require the states to correlate every dollar of tax raised from any non-Indian doing business with an Indian tribe with every dollar of governmental expense incurred. This Court recently refused to require the State of Montana to enter into such dollar-for-dollar justification, and affirmed the state's right to a general revenue raising tax. *Commonwealth Edison Company v. Montana*, — U. S. —, 69 L. Ed. 2d 884, 897-898 (1981). The Court observed:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled to is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 521-522 (1937), 81 L. Ed. 1245, 57 S. Ct. 868, 109 A. L. R. 1327 (1937) (citations omitted).

Clearly, the non-Indian business, such as Lembke Construction Company, has substantial off-reservation connections. The mere fact that some of Lembke's business occurred on a reservation and was the result of a contract with an Indian tribe should not relieve Lembke from paying the taxes which make an organized society possible.

A second absurd result of the interpretation of appellants and the United States is that those who do business

with Indian tribes are exempt from state taxes, while those who do business with the United States government must pay the same taxes. For instance, the New Mexico Gross Receipts Tax, at issue in this case, has been held to be validly collected from contractors who do business with the United States. *United States v. State of New Mexico*, 581 F. 2d 803 (10th Cir. 1978).[5] Under that case, if the contract for the construction of the school were let by the United States or the Bureau of Indian Affairs, the gross receipts tax unquestionably would be due from Lembke Construction Company. This Court should not allow evasion of the tax merely because an Indian tribe is the contracting entity.

Finally, a decision of this Court upholding the arguments of the Ramah Navajo School Board and Lembke Construction Company, and the interpretation of the United States, would prohibit the states from imposing any type of tax on non-Indians with respect to their on-reservation business, the only possible exception being the tax on the type of activities in the *Colville* situation.

At issue in further litigation could be corporate license taxes and income taxes normally payable by non-Indian corporations which are incorporated under State law and do business on a reservation. Arguably, a non-Indian employee would not have to pay his individual income tax on earnings for his work for an on-reservation Indian employer. A non-Indian employer would not have to pay for unemployment compensation or worker's com-

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5. *See also, Kiewit v. State Board of Equalization*, 505 P. 2d 102 (1973); *Kiewit v. Department of Revenue*, 531 P. 2d 1327 (1975); *Montana v. United States*, 440 U. S. 147 (1979).

pensation for his employees, if they were working on activities on behalf of an Indian tribe on-reservation. A logical extension of appellants' arguments means that non-Indians could evade all taxes to which they were otherwise subject in the various states by entering into contracts with an Indian tribe.

The *Amici* States submit that these predictable results are absurd and avoidable. This Court should continue to use the legal incidence test and provide both Tribes and States with rational, fair results.

III.

The Indian Commerce Clause cannot be expanded to prohibit state taxation of non-Indians doing business with Indian tribes.

The United States, in part B of its brief as *amicus curiae*, suggests that there is an actual and potential unique sort of disarray and misunderstanding among the state courts and lower federal courts concerning state authorization to tax and regulate activities or transactions within an Indian reservation. The United States uses this starting point to propose that this Court "straighten out" the past confusion and guarantee future clarity by using an expansive application of the Indian Commerce Clause (U. S. Br. 17-24). *Amici* States agree that the judicial weighing of the competing interests of the States, the Tribes and the United States is completely unsatisfactory.[6] The States, however, disagree that the proper

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6. We realize, of course, that the Court has recently taken this balancing function upon itself, as exemplified in *White Mountain Apache, supra,* and *Central Machinery v. Arizona Tax Comm.*, 448 U. S. 160 (1980), under the rubric of a "particularized inquiry." But that is precisely what has created the problem which we and the United States agree should be solved.

solution to this unsatisfactory approach could be created from the "modest proposal" (U. S. Br. 18) by the United States to use an expansive application of the Indian Commerce Clause.

At one period in our history the proposed expansive application of the Indian Commerce Clause may have made complete sense; dealings between Indians and non-Indians would be completely "off limits" to state regulatory power, including state taxing power. During that period, which extended roughly through the first three quarters of the Nineteenth Century, federal policy was to isolate Indians from non-Indians, by means of the reservation system. At that time the inhabitants on those reservations were, both in law and in practice, the exclusive responsibility of the federal government, not the States. Thus, as pointed out by the United States (U. S. Br. 21) this Court could reasonably state in 1866 that "there can be no divided authority" between federal and state governments in Indian affairs. The *Kansas Indians*, 72 U. S. (5 Wall.) 737 (1866).

Congressional policies to divide tribal lands into individual allotments, thereby furthering congress' assimilationist policies at the last quarter of the Nineteenth Century, culminated in the General Allotment Act of 1887, 25 U. S. C. §§ 331-358. That Act contemplated complete termination of the reservation system, elimination of federal responsibility for Indians, and subjection of Indians to state law in the same manner as everyone else once they received unrestricted title to their allotments. Since 1887 there have been numerous reversals and counter-reversals in federal policy. Despite such changes in federal policy, however, one part of the assimilationist policy

has remained unchanged, and in fact was reaffirmed and actually speeded up in 1924. Indians were to be citizens of the United States and therefore of the States in which they reside, regardless of the status of their land holdings, in the Indian Citizenship Act. Act of June 2, 1924, 43 Stat. 253, 8 U. S. C. § 1401 (a) (2).

This has important consequences. What the United States characterizes as a "wall" which New Mexico is attempting to breach in this case (U. S. Br. 23) is not really a wall at all, but a *filter*. By reason of the Equal Protection Clause of the Fourteenth Amendment, both Indians and non-Indians, even when on a reservation, are entitled to all of the benefits of State law to which citizens outside the reservation are entitled. It is only the burdens imposed by state law which are screened out.

The best illustration of the operation of this "filter" is found in the field involved in this litigation, Indian education. The legal situation has been well summarized by one commentator as follows:

> Legally, the states, rather than the federal government, have the duty to provide education services for Indian children. The Supreme Court has ruled emphatically that the opportunity for public education, "where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms." Indian children, as citizens of the state in which they reside, are entitled to a free public education to the same extent as other citizens. It has long been held by both state and federal courts that the provisions of Indian schools by the Bureau of Indian Affairs does not justify the exclusion of Indian children from public schools. Nor do the Indian treaties impose on the federal government a generalized responsibility for the education of Indian children.

> [Footnotes omitted.] Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 Law and Contemp. Prob. 190, 194 (1976).

The practical results flowing from this legal situation are as one would expect:

> About 80 per cent of the 350,000 American Indian school children attend public schools. At least half of these children attend schools funded in large measure by local property taxes. However, the remaining half attend schools in 'reservation' districts containing blocks of Indian land held in trust by the United States and exempt from real property taxation. Accordingly, in reservation districts the federal government provides Impact Aid funds in lieu of local property taxes and special assistance for school construction. Rosenfelt, *supra*, at 192.[7]

In education, then, as well as in other areas of state services, such as public health, public assistance or other welfare programs, it is simply untrue that the States have "no duties or responsibilities respecting the reservation Indians," and *White Mountain Apache Tribe v. Bracker*,

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7. The problem of local school districts with low levels of taxing resources is not unfamiliar to this Court. See, *Rodriquez v. San Antonio School District*, 411 U. S. 1 (1972). The tax immunities enjoyed by Indians and their lands simply exacerbate this problem for reservation school districts. To the extent, however, that a state equalization system eliminates that problem, it reduces the need for federal Impact Act funds. Many states have adopted such equalization systems. In Montana, for instance, 'Interest and Income Moneys' are derived from various sources set forth in 1972 MONT. CONST., Art. X, Sec. 2, and are placed into a general state wide fund. Ninety-five per cent of this income must be "equitably apportioned annually to public school districts," based on the number of students in the school and the number of days attended, regardless of the taxing resources of the particular school's district. 1972 MONT. CONST., Art. X, Sec. 5; M. C. A. §§ 20-9-341-344.

448 U. S. 136, at 152, is wrong on that point. That statement, which was first made in *Warren Trading Post v. Arizona Tax Commission*, 380 U. S. 685 (1965) remains erroneous. It is the Fourteenth Amendment itself which made it erroneous.[8]

The immunity of tribes and on-reservation tribal members living on their own reservation, of course should not be impaired. However, with respect to state taxation of on-reservation activities of non-Indians dealing with tribal members on their own reservations or an Indian Tribe, this Court should continue to apply the Indian Commerce Clause just as it has in the past, utilizing, for instance, the same sort of reasoning used in *Thomas v. Gay, supra.* There, this Court upheld a tax upon cattle of a non-Indian grazing on Indian lands pursuant to a lease with the tribe. This Court stated:

> It is further contended that this tax law of the territory of Oklahoma, insofar as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or imposes

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8. The United States in its statement of the Question Presented, in its heading for the Argument, and in the argument itself suggests that New Mexico has "relinquished" its responsibility for educating the children attending the school involved in this case. (U. S. Br. (i), 9; *cf.* also p. 23). The suggestion is highly misleading. A state cannot relinquish its Fourteenth Amendment responsibilities; and those responsibilities include the education of Indian children. Indian parents and tribal leaders may well believe—and quite correctly in many cases—that with federal funding they can provide a better education than the state provides, for reasons discussed in the article quoted above. But in this they are in essentially the same situation as the parents of children who choose to send their children to a private school, the only difference being that Indian parents do not have to shoulder the financial responsibility for the school.

> a servitude upon, a lawful commercial intercourse with the Indians, over which Congress has absolute control, and in the exercise of which contract it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.
>
> The unlimited power to Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power. . . . 169 U. S. at 274.

Such an application of the Indian Commerce Clause would yield results and tests which are consistent with those which have always been applied when taxable entities or individuals who do business with a non-taxable entity, such as the federal government or a tax-exempt organization. In other words, in like cases, the federal government, Indian tribes, individual on-reservation tribal members, or a tax-exempt organization, would remain immune from taxes. The private non-Indian party doing business with these entities would be presumptively taxable. This presumption, then, would be overcome only by a *clear* expression of congressional intent that those non-Indian parties doing business with the federal government or an Indian Tribe should also be immune from taxation.[9]

These parallel tests would place tribal government in the same position as the federal government. The proposal of the United States, in contrast, would actually

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9. This proposed solution to the problem presented by the "particularized inquiry" approach is similar to that of the United States, in that it relies heavily upon the use of a presumption. Our presumption, however, is just the opposite of that suggested by the United States.

place Indian tribes in a position superior to the United States with no congressional, constitutional or treaty warrant for doing so. There is no justification for adopting an approach so inconsistent with the approach used in any other comparable situation.

There is a final problem with the United States' proposal for the expansion of the Indian Commerce Clause. Under the guise of an interpretation of the Indian Commerce Clause, this proposal would resurrect the "intergovernmental immunity doctrine [which] was once much in vogue in a variety of contexts," including the context involved in this case, taxation of those doing business with Indian Tribes. *Mescalero Apache Tribe v. Jones, supra,* 411 U. S. at 150. In *Mescalero,* this Court traced the rise and fall of this doctrine, as applied both to the federal government and to Indian tribes, 411 U. S. 150-155, and concluded by stating:

> "We accordingly decline the invitation to resurrect the expansive version of the intergovernmental-immunity doctrine that has been so consistently rejected in modern times. 411 U. S. 155.

The proposal of the United States is, at bottom, a similar invitation which should also be declined.

IV.

The Jicarilla decision recognizes the States' continued power to tax non-Indians.

On January 25, 1982, this Court decided *Merrion v. Jicarilla Apache Tribe,* — U. S. — (50 U.S.L.W. 4169) (1982). Its holding is clear: in the context of tribal severance taxes imposed with respect to oil and gas production activities occurring wholly upon Indian reservation trust lands, Indian tribes possess as an inherent attribute

of their tribal sovereignty the power to tax non-Indians doing business with Indian tribes within the territorial limits of their reservations. The holding is also clear that the States continue to have the power to tax non-Indians doing business with Indian Tribes, even when the tribe taxes the same activity.

The *Jicarilla* opinion is couched in terms which not only recognize the authority of Indian tribes to impose their taxes upon non-Indians under certain circumstances, but also recognize the continuing authority of the States to tax in like fashion. For example, through numerous citations in the opinion to the prior decision in *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134 (1980), this Court rejected the non-Indian petitioners' argument that Congress had divested the tribes of the power to tax non-Indians by conferring that power upon the states. Indeed, the *Jicarilla* opinion specifically quotes from the *Colville* decision (447 U.S. at 158 (*Jicarilla* Slip Op. at 20):

> "'There is no direct conflict between the state and tribal [taxing] schemes, since each government is free to impose its taxes without ousting the other.'"

In further support of the proposition, the Court noted (*Jicarilla* Slip Op. at 19-20) that the mere existence of State authority to tax does not deprive the Indian tribe of its power to tax, citing *Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977).

It is significant that the Court in *Jicarilla* cites *Commonwealth Edison v. Montana,* — U.S. —, 1015 S. Ct. 2946 (1981) to show two things: (1) the firm and unquestioned power of a sovereign such as a State to tax for general

revenue raising purposes,[10] and (2) the minimal contacts which must exist between the taxed entity and taxing authority. The record in this case shows that Lembke Construction Company is a New Mexico corporation, doing business within the State, with its base in Albuquerque. Its business is conducted predominently off-reservation. The contacts between the State of New Mexico and the Lembke Construction Company are at least as significant as those which existed between the State of Montana and the utilities in *Commonwealth Edison.* Thus, the rationale of the *Jicarilla* decision supports the continued power of the States to tax non-Indians who perform otherwise taxable activities on Indian reservations.

CONCLUSION

The *Amici* States recognize that Indian tribes and their on-reservation property are in most situations tax exempt. If this Court accepts appellants' arguments, founded primarily on *Bracker,* the Court will give non-Indians a magic wand which may be used when they do business with an Indian tribe. Upon touching the wand, the non-Indian, otherwise subject to all taxes and costs of doing business within the State, changes into a tax exempt entity.

In addition, the suggestion of the United States that the Indian Commerce Clause be expansively applied, which the United States argues will provide a panacea for all future questions in this complex area of the law, is mere sleight of hand which should be rejected.

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10. Amici acknowledge that the Court in *Jicarilla* compares that unquestioned power of the State of the tribes to tax non-Indians under certain circumstances.

The decision of the Court of Appeals of New Mexico should be affirmed.

Respectfully submitted,

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys
General for the State of Montana
P. O. Box 8032
Missoula, Montana 59807
Telephone: (406) 728-0921
Attorneys for the
State of Montana

IAN A. MACPHERSON
Chief Counsel Tax Division
Office of the Attorney General
of the State of Arizona
State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

LELAND T. JOHNSON
Assistant Attorney General
of the State of Washington
Temple of Justice
Olympia, Washington 98504
Attorney for the
State of Washington

WARREN SPANNAUS
Attorney General of the
State of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
Attorney for the
State of Minnesota

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501
Attorney for the
State of South Dakota

RICHARD H. BRYAN
Attorney General of the
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
Attorney for the
State of Nevada

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No. 80-2162

In the Supreme Court of the United States

OCTOBER TERM 1981

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.
Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS
and
BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

GEORGE P. VLASSIS
Katherine Ott
Vlassis & Ott
1545 W. Thomas Road
Phoenix, Arizona 85015
(602) 248-8811
Counsel for the Amicus Curiae

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS.

The Navajo Tribe of Indians respectfully moves this Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Navajo Tribe states:

1. The Navajo Tribe of Indians (the Navajo Tribe) is a federally recognized Indian Tribe and is the largest such tribe in the United States, comprised of one hundred sixty thousand members and occupying 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah.

2. The issue presented in this case—the extent, if any, of a state's power to tax the activities of non-Indians performing federally-funded, federally-regulated work on tribal lands—will determine whether, after *White Mountain Apache* and *Central Machinery*,[1] Indian tribes must share with states those funds ear-marked by Congress to further the national interest in Indian education.

3. The outcome of this appeal will determine whether federally funded programs implementing rights guaranteed to the Navajo Tribe by the Treaty of 1868 can be crippled by the diversionary interference of state taxation.

4. The Navajo Tribe of Indians was granted leave to file, and did file, a Jurisdictional Statement Amicus Curiae In Support of Appellants pursuant to Order of this Court dated November 30, 1981.

For the foregoing reasons, the Navajo Tribe of Indians respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Dated this _____ day of January, 1982.

GEORGE P. VLASSIS
Katherine Ott
Vlassis & Ott
1545 W. Thomas Road
Phoenix, Arizona 85015
(602) 248-8811
Counsel for Amicus Curiae

[1]*White Mountain Apache Tribe v. Bracker* 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

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ON APPEAL
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BRIEF OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land in Arizona, New Mexico and Utah.

Numerous federally-funded programs are carried out on Navajo land with the help of services rendered by non-Indians. These services are taxed by the states, with the tax then passed through to the tribe to be paid with part of the federal funds.

States are notorious for their failure to provide governmental services to Indian peoples. Thus, funds diverted by the states from federal Indian programs are, for all practical purposes, lost to the tribe.

Where, as here, the federal funds are intended to build schools and where, as here, the federal government has by treaty committed itself to such school construction, the diversion by state tax laws of federal funds is particularly unconscionable and is, in fact, unlawful under the decisions of this Court.

SUMMARY OF ARGUMENT

State governments are experiencing a tax windfall from the mere presence of Indian tribes within their borders. Federal monies, appropriated by the millions to fund projects on Indian reservations in fulfillment of treaty and trust responsibilities, are consistently diverted to State coffers by means of taxes levied on non-Indians who work on the reservations, paid by federal funds, to carry out the federally-authorized projects.

Such taxation is impermissible where the non-Indian's services fall under a scheme of comprehensive federal regulation and where the services entail subject matter which goes to the core of tribal self-government.

Indian education exemplifies the appropriate circumstance for the application of the federal doctrine of preemption. The Navajo Tribe, through the Ramah Navajo School Board, petitioned the federal government for financial assistance. The response of the Congress was one of overwhelming support. Funds were allocated by Congress for the construction and improvement of educational facilities in Ramah. It is these funds which New Mexico diminished with its gross receipts tax. It is this tax which, the Navajo Tribe of Indians respectfully submits, should be held by this Court to be preempted by federal law.

SELF-GOVERNMENT, AT A MINIMUM, ENTAILS THE ABILITY TO EDUCATE CHILDREN: THE QUALITY AND AVAILABILITY OF NAVAJO SCHOOLING IS DIRECTLY AND SEVERELY IMPACTED BY STATE TAXES SIPHONING FEDERAL FUNDS FROM SCHOOL CONSTRUCTION PROJECTS.

In 1959, with the decision in *Williams v. Lee*, 358 U.S. 217 (1959), this Court began the modern era of federal Indian law. The impact of this decision has been felt in every subsequent case examining the scope of Indian tribal sovereignty. The precise question before the Court in 1959 was whether a non-Indian could bring a civil suit in state court against a Navajo for events arising on the Navajo Reservation. This Court required the non-Indian to seek relief in tribal courts, concluding that:

> There can be no doubt but that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.

358 U.S. at 223.

The *Williams v. Lee* standard has been characterized as prohibiting application of a state law "which frustrates tribal self-government." *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 483 (1976) (upholding a state law requiring Indian sellers to collect a state tax from non-Indian buyers, pointedly observing that the state law was not a tax, finding the collection to be a minimal burden which did not frustrate tribal self-government).

The *Williams v. Lee* test was a major element of this Court's recent holding in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) which struck down a state tax on a non-Indian's services rendered on a reservation to an Indian tribe.

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl.3. *See United States v. Wheeler, supra,* 435 U.S., at 322-323. This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. *See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n, supra.* Second, it may unlawfully infringe 'on the right of res-

ervation Indians to make their own laws and be ruled by them.' *Williams v. Lee*, 358 U.S. 217, 220 (1958). 448 U.S. at 142. (Some citations omitted.)

Williams v. Lee and its progeny do not of themselves invalidate the New Mexico tax on the Ramah school contractor. Preemption has instead been the favored legal theory in this regard. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache, supra; Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

Nevertheless, the nexus between the construction and future health of the Ramah school project and the self-government of the Navajo Tribe is of sufficient strength and merit as to provide an important backdrop for this Court to render its decision on preemption. *White Mountain Apache v. Bracker, supra* at 143. ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law."); *Moe v. Salish & Kootenai Tribes, supra* at 475. ("In *McClanahan* this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes 'which define the limits of state power.' 411 U.S. at 172. Reading them against the 'backdrop' of the Indian sovereignty doctrine, the Court concluded 'that Arizona ha[d] exceeded its lawful authority' by imposing the tax at issue."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because

it provides a backdrop against which the applicable treaties and federal statutes must be read.")

Education is acknowledged by this Court to be a primary function of government, whether federal, state or tribal. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954) ("Today, *education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today *it is a principal instrument in awakening the child to cultural values,* in preparing him for later professional training, *and in helping him to adjust normally to his environment.*" Emphasis added.)

The importance of formal education to Indian societies in the twentieth century is well documented, as is the need for tribal control of such education. The American Indian Policy Review Commission established a separate task force to address this one issue alone. With respect to tribes in general, the education task force in 1976 reported that:

> The last major policy review of Indian affairs was in 1928—some forty-eight years ago. Since that time, very little has changed in Indian education. The types of schools are the same, and the federal agencies administering the services and programs are the same. Limited respect for Indian culture and limited development of Indian curriculum has been initiated. Yet, surveys, studies and investigations have occurred with growing momentum each year. It is time for the U.S.

> Congress to realize that it has been grossly negligent in the area of policy making and financing for Indian education. Congress has given Indians piecemeal efforts and totally inadequate financing in this area. They have abdicated Congressional intent to administrative discretion. At the beginning of the new Bicentennial year, *Congress should declare a policy of support and financing for Indian community control of all aspects of Indian education. The obligation and right to an education which all Indians feel they have from the Congress and the federal government should be fulfilled.*

Final Report to the American Indian Policy Review Comm'n, Task Force Five: Indian Education at 13 (1976). (Emphasis in original.)

Section VI of the task force report is a special study of Navajo education. The most pertinent observations of the task force with respect to the link between the Ramah school and Navajo Tribal self-government are as follows:

> The inherent potential advantage for the public school is community and local control through the election of a school board. The Navajo themselves can elect the school board members. In this way, there can be complete Navajo control of public school districts if the Navajo people choose to take such action.
>
> * * *
>
> An adequate system of Navajo education will never be possible until adequate educational facilities equal to those available to off-reservation students are provided. Up to this point, the Congress of the United

States has failed to support this principle in its implementation and practice.

* * *

General Recommendations.—The following policy implementation is essential to the proper growth and development of a quality system of Navajo education which meets the needs of individual students.

Adequate Finances.—Whether it be Bureau of Indian Affairs, Public School, Contract School or other, the financial needs of all of these is acute and is growing more serious with each passing day. While it is certainly true that money is never the complete answer, it is equally true that without an adequate, secure source of money, Navajo education can never embark upon bold plans which will strengthen Navajo education.

Id. at 176, 177, and 188.

The importance of Navajo control of schools as an essential element of tribal self-government is described in detail by a report of the United States Commission on Civil Rights, "The Navajo Nation: An American Colony" (1975).

> This plan [of the Navajo Tribe] for Navajo authority over all reservation schools was just one aspect of the common theme throughout the Window Rock hearing: the desire for self-determination in the tribe's own affairs. In education, the groundswell developing around that concept became apparent in the testimony of students, parents, and teachers, who traced many of the school's problems to the century-old conflict between the Navajo and Anglo cultures.
>
> * * *
>
> As an alternative to both public and BIA schools,

the Navajo people have taken some steps toward local control of the schools. At the time of the hearing, there were four experimental Navajo-controlled schools on the reservation.[242] Formerly run by the BIA, each of the incorporated schools had a BIA contract for community operation with BIA funding.

The emphasis in the contract schools is on making education relevant to the Navajo child living in a Navajo community. Much of the instruction is done in Navajo, using a bilingual method of course presentation. The curriculum is largely bicultural, so that the Navajo students learn about their history and culture.

* * *

242. Borrego Pass, Ramah, Rock Point, Rough Rock: referred to also as 'BIA contract schools,' or 'demonstration schools.'

Id. at 60, 70, 70 n.242.

The importance of education to the Navajo Tribe is demonstrated by the Navajo Tribal Code which contains twenty-three titles, one of which, Title 10, is devoted solely to education. The tribal education laws govern such basics as the provision of clothing, 10 N.T.C. § 701, and scholarship monies, 10 N.T.C. § 901. The code provides a procedure for obtaining rent-free tribal lands for schools, 10 N.T.C. § 1201, and for establishing Local Navajo Community School Boards, 10 N.T.C. § 201. Provisions are made for adult education, 10 N.T.C. § 1401, and community colleges, 10 N.T.C. § 2001.

The Ramah Navajo School Board is an entity of the Navajo Tribe created pursuant to 10 N.T.C. § 201, a codification of Navajo Tribal Council Resolution CAU-87-69.

The authorizing resolution contains a preamble which begins:

> Whereas: (1) the Navajo Tribe is committed to the continuous improvement in the quality of education available to the Navajo People, and (2) The Navajo People have demonstrated a willingness and a desire to have greater participation in local school affairs, and (3) Local School Boards would improve the quality of education on the Navajo Reservation. . . .

Ramah is one of 109 Chapters (local governmental units akin to counties) of the Navajo Tribe. To date, over 80 Chapters have taken advantage of the authorizing resolution to form local school boards. The success of each will depend in large part on the availability of adequate financing. The extent to which the Chapters successfully exert local control over state or BIA schools will depend in large part on the financial resources of these "Navajo-controlled" schools.

If Ramah and other Navajo school boards must divert federal funds from school construction to state tax coffers, Navajo education, and with it tribal local self-government, suffers.

It is against this backdrop of tribal sovereignty, in general, and the Navajo educational crisis, in particular, that the question of federal preemption of the New Mexico gross receipts tax must be determined.

THE FEDERAL GOVERNMENT THROUGH TREATIES, SPECIFIC ACTS OF CONGRESS REGARDING RAMAH, AND COMPREHENSIVE INDIAN TRADER REGULATIONS HAS PREEMPTED THE NEW MEXICO GROSS RECEIPTS TAX.

In the unique area of taxation this Court has repeatedly applied the doctrine of preemption to invalidate a state tax falling upon a non-Indian for work performed on an Indian reservation.

The seminal decision in 1965 *Warren Trading Post v. Arizona Tax Comm'n, supra,* voided a state tax on an Indian trader on the basis of federal preemption:

> These apparently all-inclusive regulations [governing Indian traders] and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.
>
> * * *
>
> This state tax on gross income would put financial burdens on appellant *or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 690, 691. (Emphasis added.)

Fifteen years later the Court again addressed the issue of federal preemption of a state tax on non-Indians for work performed on a reservation. In *White Mountain Apache*

Tribe v. Bracker, supra, the Court painstakingly set forth the standards to be applied where preemption is at issue:

> Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. We have thus reflected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.
>
> * * *
>
> [W]e have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 143, 144. (Citations omitted.)

The Court then applied these standards in the *White Mountain Apache* decision highlighting those aspects of federal law and regulation it found to be controlling:

> At the outset we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by

the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.

* * *

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs.

* * *

In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. . . . There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.

448 U.S at 145, 148. (Citations omitted.)

In *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* the Court further extended *Warren Trading Post:*

It is irrelevant that appellant is not a licensed Indian trader. . . . It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.[4]

* * *

[4]In any event, it should be recognized that the transaction at issue in this case was subjected to comprehensive federal regulation. . . . [T]he Bureau of Indian Affairs had approved both the contract of sale for the

tractors in question and the tribal budget, which allocated money for the purchase of this machinery. 448 U.S. at 164, 165.

The *Warren Trading Post, White Mountain Apache* and *Central Machinery* decisions provide the guideposts for this Court's determination of the Ramah tax issue. To show preemption of the New Mexico gross receipts tax, the Ramah school board (or any similar tribal entity) must show (1) the existence of a federal regulatory scheme (treaties, Acts of Congress, regulations of the Secretary of the Interior, actual Bureau of Indian Affairs involvement), (2) obstruction of federal policies and (3) the lack of a regulatory function or service performed by the State that would justify the tax.

First, with respect to the federal regulatory scheme, the position taken by the Ramah school board in this suit is fully supported. The Treaty of 1868, Art. VI states in pertinent part that "the necessity of education is admitted" and, therefore, "the United States agrees that, for every thirty children between [six and sixteen years of age] who can be induced or compelled to attend school, a house shall be provided." 15 Stat. 667, 669. Although by its terms this treaty guarantee was for only ten years, this Court recognized the 1868 treaty obligation in 1965 in *Warren Trading Post v. Arizona Tax Comm'n, supra.* ("And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians." 380 U.S. at 690.) With respect to the preemptive value of the Navajo treaty, this Court has stated: "The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed

upon by parties dealing at arm's length with equal bargaining positions. . . . [T]his Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation." *McClanahan v. Arizona State Tax Comm'n, supra,* at 174, 175.

The federal regulatory scheme is further demonstrated by Acts of Congress authorizing and funding Indian education programs of benefit to all tribes. *See, e.g.,* the Johnson O'Malley Act, 25 U.S.C. § 452, 48 Stat. 596, as amended by 49 Stat. 1458. ("The Secretary of the Interior is authorized . . . to enter into a contract or contracts . . . for the education . . . of Indians . . . ") Indian Education Act, Pub. L. 92-318, 86 Stat. 334, 20 U.S.C. § 887c ("the Commissioner shall carry out a program of making grants for the improvement of educational opportunities for Indian children [for specific projects]") and the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.,* 88 Stat. 2203 ("The Secretary is authorized to enter into a contract or contracts with any . . . school district [to assist] in the acquisition of sites for, or the construction, acquisition, or renovation of facilities . . . if such facilities are necessary for the education of Indians." 25 U.S.C. § 458 (a)).

Congress has also enacted laws relating specifically to Navajo education. In the Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 44, Congress authorized and directed the Secretary of the Interior to undertake a program of basic improvements including an expenditure "(12) School buildings and equipment, and other educational measures, $25,000,000." 25 U.S.C. § 631.

Of particular import to this case, Congress spoke directly to the need for a school in Ramah authorizing and

funding the design and construction of the Ramah school with a series of appropriations measures. Pub. L. 93-120, 87 Stat. 431; Pub. L. 93-245, 87 Stat. 1073; Pub. L. 93-404, 88 Stat. 810; Pub. L. 94-165, 89 Stat. 985; Pub. L. 95-74, 91 Stat. 293.

The federal regulatory scheme governing the construction of the Ramah school is again exemplified by regulations issued by the Secretary of the Interior. *See, e.g.*, 25 C.F.R. Parts 271 and 274, implementing the Indian Self-Determination Act, *supra;* 25 C.F.R. Part 31(a), implementing Pub. L. 95-561, 25 U.S.C. § 2001 *et seq.;* 25 C.F.R. Part 252, implementing the Indian Trader Statutes, 25 U.S.C. §§ 261-264.

Finally, as with *Central Machinery*, the Bureau of Indian Affairs was involved in the approval of the construction contracts.

This federal regulatory scheme fulfills the tests of *Warren Trading Post* and *White Mountain Apache*. The regulations are "comprehensive," 448 U.S. at 145, and "all-inclusive," 380 U.S. at 690, such that "no room" remains for state taxes, 448 U.S. 148, 380 U.S. at 690. The scheme is "so pervasive as to preclude the additional burdens," 448 U.S. at 148, of state taxation. Moreover, the federal regulatory scheme is evidenced by "the language of the relevant federal treaties and statutes," 448 U.S. at 144.

The second major preemption test of *Warren Trading Post v. Arizona Tax Comm'n, supra,* and *White Mountain Apache Tribe v. Bracker, supra,* is whether the state tax "could disturb and disarrange the statutory plan Congress set up," 380 U.S. at 691, or "obstruct federal policies," 448 U.S. at 148.

Congress allocated specific sums to be used for the *construction* of the Ramah school. A New Mexico law that diverts a quarter of a million dollars targeted for Ramah to totally unrelated state programs "disturb[s] and disarrange[s] the statutory plan." Similarly, such a diversion "obstructs federal policies" such as those set forth in the Indian Education Act, *supra* at 20 U.S.C. § 241aa ("In recognition of the special educational needs of Indian students in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out elementary and secondary school programs specially designed to meet these special education needs."); Indian Self-Determination Act, *supra,* ("The Congress further finds that . . . (3) parental and community control of the educational process is of crucial importance to the Indian people." 25 U.S.C. § 450(b) (3). "Congressional declaration of policy . . . (c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. § 450a.); or in the regulations implementing Pub. L. 95-561 ("§ 31a.4 Policies . . . (p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native student's home as possible. . . ." 25 C.F.R. Part 31a, emphasis in original.)

The third major test for federal preemption of state tax law is described in *White Mountain Apache Tribe v. Bracker, supra,* as whether or not there exists a "regulatory function or service performed by the State that would justify" the

imposition of the New Mexico gross receipts tax on Lembke Construction Company. 448 U.S. at 148. The test is derived from *Warren Trading Post v. Arizona Tax Comm'n, supra,* which held:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

380 U.S. at 691.

With respect to the present Ramah tax issue, New Mexico is in a poor position to urge that it has any interest other than a "general desire to raise revenue." 448 U.S. at 150. New Mexico closed its Ramah educational facilities, so certainly the money diverted from the Ramah school project is not returned in the form of educational services from the State of New Mexico. In fact, New Mexico would be hard put to identify *any* service it provides the Ramah community. Having defaulted on the duty of providing education to the Navajo children in Ramah, the State of New Mexico is estopped under *Warren Trading Post v. Arizona Tax Comm'n, supra,* from asserting "the privilege of levying this tax." 380 U.S. at 691.

The conclusion to *White Mountain Apache, supra,* might well have been written for Ramah:

> Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.[15] Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose,

and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible. [Footnote 16 omitted.]

* * *

[15]Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm'n, supra*, makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm'n, supra*, leaves no room for the additional burdens sought to be imposed by state law.

448 U.S. at 151.

Federal funds intended to furnish a building for Ramah Navajo students should not be diminished by state taxation. The federal regulatory scheme leaves no room for the imposition of the burdensome New Mexico gross receipts tax, a tax of no discernible benefit to Ramah.

CONCLUSION

The resolution of issues raised by the present impact of state tax laws on Indian education programs authorized, encouraged and funded by the Federal Government will determine the extent to which a State may interpose its power of taxation to impede the fulfillment of federal Treaty obligations. Surely a state government cannot be permitted

to first deprive the Navajo of a needed state-funded educational facility and then tax the Navajo effort to provide its own facility. Where, as here, the obligation is one of highest import to Navajo self-government and where, as here, the federal regulatory scheme is all pervasive, the state tax must give way. The Navajo Tribe of Indians respectfully submits that Federal legislation read against the backdrop of tribal sovereignty preempts the application of the New Mexico gross receipts tax to Lembke Construction Company for activities on Navajo land in furtherance of the completion of the Ramah school project.

For the foregoing reasons the decision of the Court of Appeals for the State of New Mexico should be reversed.

Respectfully submitted, January, 1982.

GEORGE P. VLASSIS, ESQ.
Katherine Ott, Esq.
Vlassis & Ott
1545 W. Thomas Road
Phoenix, Arizona 85015

Counsel for Amicus Curiae

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No. 80-2162

In The

Supreme Court of the United States

October Term 1981

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE BRIEF OF THE PUEBLO OF SANTA ANA AS AMICUS CURIAE, AND BRIEF OF PUEBLO OF SANTA ANA AS AMICUS CURIAE

LUEBBEN, HUGHES
& KELLY
805 Tijeras NW
Albuquerque, NM
(505) 842-6123

RICHARD W. HUGHES
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for the
Amicus Curiae

No. 80-2162

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Appellee

MOTION FOR LEAVE TO FILE BRIEF OF THE PUEBLO OF SANTA ANA AS AMICUS CURIAE

The Pueblo of Santa Ana, by and through its counsel, moves this Court for leave to file the attached brief as amicus curiae in this proceeding. Consent of the parties has been sought. The appellants have consented, but the appellee, New Mexico Bureau of Revenue, has refused to consent.

The Pueblo of Santa Ana ("Santa Ana") is a federally recognized Indian

tribe, situated in Sandoval County, New Mexico. Santa Ana has, for the past several years, been pursuing a policy of developing and utilizing its land and resources in ways that will yield long-term economic and social benefits to the Pueblo and its members, without impairing important cultural or environmental values. Many of the projects Santa Ana has commenced or is considering will entail substantial construction projects on the tribe's lands, and like most Indian tribes in New Mexico and elsewhere, Santa Ana will be forced by necessity to approach non-Indian firms to supply the services, including construction services, that will be needed. In times of scarce public funds and sharply rising costs, such as the present, the imposition of state gross receipts taxes on these projects can seriously affect their economic

feasibility. The effect of the New Mexico Court of Appeals decision in the instant case goes far beyond the area of school construction on the Navajo Reservation. All 22 Indian tribes in New Mexico face substantial adverse economic impacts on their development efforts, if the Court of Appeals' opinion is not reversed by this Court.

Santa Ana wishes to file its brief as amicus curiae, to point out the potentially broad impact of the Court of Appeals ruling, and to demonstrate that that ruling is completely inconsistent with decisions of this Court that reach back nearly a century and a half. Santa Ana believes that this Court's opinions in the area of state tax applicability in Indian country establish clear and consistent rules that the Court of Appeals decision has thoroughly ignored. Santa

Ana believes that no other party to this proceeding will present the broad tribal perspective that motivates Santa Ana, and that its views on the issues on this important case may be of value to this Court.

Respectfully submitted,

Richard W. Hughes
LUEBBEN, HUGHES & KELLY
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for Amicus Curiae

DATED: January 25, 1982

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BRIEF OF PUEBLO OF SANTA ANA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the Pueblo of Santa Ana in the issues raised by this case are set forth in the Motion for Leave to File Brief as Amicus Curiae, ante at i-iv.

SUMMARY OF ARGUMENT

In Thomas v. Gay, 169 U.S. 264 (1898), this Court established the principle governing the imposition of state taxes on non-Indians in Indian country. Under Thomas, only when the tax at issue poses no direct or substantial burden on Indian interests will it be allowed. More recent cases indicate that the burdened Indian interest must be "significant" to warrant avoidance of the tax, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 155 (1980), but that a showing of strong federal concern with the burdened interest will, alone, establish the Indian interest as sufficiently "significant" to preempt any state taxation. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); White Mountain Apache Tribe v. Bracker, 448

U.S. 136 (1980); Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980).

In the instant case, the state taxes directly and substantially burdened the Ramah School Board's effort to provide adequate education for Navajo youth. They also constituted a direct burden on business activity with Indians in Indian country. Under an unbroken line of authority in this Court, the taxes must be struck down.

The opinion of the court below rests on reasoning and case law directly contrary to the principles of Thomas v. Gay, Warren Trading Post, White Mountain Apache and Central Machinery, and a major element of that opinion's reasoning, its reliance on the "legal incidence" of the tax, has been specifically rejected by this Court as being of any relevance in this context. Central Machinery, 448 U.S. at 164, n. 3.

ARGUMENT

I. A LONG LINE OF CASES DECIDED BY THIS COURT ESTABLISHES CONCLUSIVELY THAT STATE TAXES ARE INAPPLICABLE WITHIN INDIAN COUNTRY IF SUCH TAXES MIGHT DIRECTLY OR PROXIMATELY BURDEN SIGNIFICANT INDIAN INTERESTS.

In the first case to reach this Court involving the applicability of state law within Indian country, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), this Court held, in a seminal opinion by Chief Justice Marshall, that within the bounds of the Cherokee territory, "the laws of Georgia can have no force." Id. at 561. Consistent with that unambiguous doctrine, this Court has repeatedly struck down efforts by states to tax Indians or their property located within Indian country. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (real property tax on trust lands); United States v. Rickert, 188 U.S. 432

(1903) (tax on Indian allotted land, and improvements and personalty thereon); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) (personal income tax on income earned on reservation); Bryan v. Itasca County, 426 U.S. 373 (1976) (personal property tax on on-reservation property); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (personal property tax, cigarette vendor's license fees, and cigarette sales tax on sales to Indian purchasers by Indian seller).[1/]

1/ Other federal courts and state courts alike, including courts of New Mexico, have similarly struck down a variety of efforts by states to tax and regulate Indians in Indian country. Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977) (gross receipts tax on sales by Indian corporation); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085 (1974) (state financial responsibility law); Your Food Stores v. Village of Espanola, 68 N.M. 327, 361 P.2d 950

As Justice Black observed in Williams v. Lee, 358 U.S. 217, 219 (1959), however, "[o]ver the years this Court has modified [Worcester's] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." Unquestionably, the area in which the Worcester rule has been most drastically altered is that of state legislative power over non-Indians within Indian

1/ (cont.) (1961) (annexation of tribal trust land by municipality); Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976) ("hot pursuit" doctrine); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1968) (state extradition laws); Francisco v. State, 113 Ariz. 427, 556 P.2d 1(1976) (authority of sheriff to serve process); Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) (county zoning ordinance); City of Sault St. Marie v. Andrus, 7 Ind. L.R. 3136 (D.D.C. 1980) (city land use ordinances); United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979) (liquor regulation).

country, the issue presented by the instant appeal.

The earliest such "modification" of Worcester in this area came in Thomas v. Gay, 169 U.S. 264 (1898), in which this Court considered the validity of a state tax on cows owned by non-Indians but grazed on Indian land under a federally-approved grazing lease. While conceding that the imposition of the tax might affect the value of the grazing lease to the Indian owner, this Court nonetheless viewed this possible burden on Indian interests as "too remote and indirect" to intrude impermissibly on Congress' power over Indian Affairs.[2/]

2/ Id. at 275. Thomas relied in part upon Utah & N.Ry v. Fisher, 116 U.S. 28 (1885), and Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347 (1895), both of which sustained the validity of territorial taxes on railroads passing through Indian reservations. In each of those cases, however, this Court's reasoning in upholding the challenged tax was ultimately bottomed on its view that

And see Wagoner v. Evans, 170 U.S. 588 (1898), in which this Court reached the same conclusion on similar facts. Thomas v. Gay thus gave rise to an important but, as the instant case suggests, debatable exception to Worcester's absolute prohibition on the application of state law within Indian country. Under Thomas, states may tax (and, perhaps, otherwise regulate) non-Indians

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2/ (cont.) the railroad right-of-way was no longer a part of Indian country. As this Court stated in Fisher, the cession of the necessary land by the tribe, and Congress' confirmation of the grant to the railroad, withdrew the land from the reservation, such that the road and the facilities therein "became subject to the laws of the Territory relating to railroads, as if the reservation had never existed." 116 U.S. at 32 (emphasis added). See also Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347, 351 (1895). It would seem, thus, that these cases provide no useful authority for state taxation of non-Indian property within Indian country, although they are sometimes cited in that context. See, e.g., Williams v. Lee, 358 U.S. 217, 220 (1959).

or their property within Indian country, but only so long as no substantial or direct burden is thereby imposed on Indian interests.[3] That doctrine still

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3/ Thomas was followed in Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906), in which the county had assessed a property tax on cattle that were maintained by a Jesuit mission on the Flathead Reservation, largely for purposes related to the Mission's charitable enterprises. This Court affirmed the lower court's dismissal of a challenge to the tax for lack of jurisdiction, and observed that "the Indians' interest in this kind of property, situated on their reservations, [is] not sufficient to exempt such property, when owned by private individuals, from taxation." Id. at 128-29. The Court also rejected the suggestion that the Mission was entitled to exemption as an instrumentality of federal policy. The "federal instrumentality" argument eventually led to a series of decisions holding that non-Indian lessees of Indian mineral interests were, in effect, instrumentalities of federal policy promoting development of Indian resources, and that under the doctrine of intergovernmental tax immunity, the proceeds were immune from state taxation. See, e.g., Oklahoma v. Barnsdall Refineries, 296 U.S. 521 (1936); Large Oil Co. v. Howard, 248 U.S. 549 (1919); Howard v. Gipsy Oil Co., 247 U.S. 503 (1918). That line of cases was overruled in Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949).

stands as the sole justification for the existence of any state legislative power within Indian country, except where Congress has expressly authorized the exercise of such power.[4/]

Not until this Court's decision in Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965), however, was it certain that the Thomas exception to Worcester was not open-ended. Arizona asserted in Warren Trading Post that it could impose its transaction privilege tax[5/] on the sales of a

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4/ See, e.g., 25 U.S.C. §348 (1976), which provides that inheritance of interests of allotments be governed by state law; 25 U.S.C. §231 (1976), providing for enforcement of state sanitation and quarantine laws, and compulsory education laws where the tribe consents.

Relying on a rationale similar to that applied in Thomas, this Court has also allowed states to exercise criminal jurisdiction over non-Indians who commit crimes against non-Indians within Indian country. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896).

5/ The Arizona transaction privi-

federally licensed non-Indian trading post, located on the Navajo Indian Reservation, to reservation Indians. This Court rejected that contention, despite the fact that under the Arizona law, the tax fell on the non-Indian seller, not the purchaser. Inasmuch as the tax would routinely be passed on to the Indian buyer, it was neither a "remote" nor an "indirect" burden on the Indian, quite unlike the property tax on non-Indian-owned cows allowed in Thomas. This Court pointed out at length in Warren Trading Post that from the earliest days of the republic, Congress had exercised its power to regulate the activities of non-Indians who engage in

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5/ (cont.) lege tax is the equivalent of the New Mexico gross receipts tax, the tax at issue in the instant case. Compare Ariz. Rev. Stat. Ann. §§42-1309, 42-1312 (1956), with N.M. Stat. Ann. §§7-9-2, 7-9-4 (1978). Such a tax is commonly called a "sales tax."

businesses with reservation Indians, and that such regulation had extended even to determining "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Id. at 689. Further, this Court noted the extensive regulations promulgated by the Secretary of the Interior pursuant to Congressional authority, at 25 C.F.R. Pts. 251, 252, governing reservation business practices. This Court held that Congress had dealt so comprehensively with the subject of business practices in Indian country "that no room remains for state laws imposing additional burdens on traders." Warren Trading Post, 380 U.S. at 690.

This passage from Warren Trading Post is often cited as the origin of the so-called "federal preemption" tests for determining the extent of state

power over non-Indians in Indian country.[6/] Equally important, however, is the opinion's focus on the directness and substantiality of the burden that application of the state tax to the trader would impose on Indians, the basis of the reasoning in Thomas v. Gay. In Warren Trading Post, the Court's "preemption" language, in the opinion's discussion of Congress' regulation of reservation business, provides a means of spotlighting the importance of the Indian interests being imposed upon by the state tax (i.e., Indian commerce, an area that the Constitution explicitly reserves to congressional control, U.S. Const., art. VII, §8, cl. 5). To view the case narrowly as a "federal preemption" case is to miss its place in the mainstream

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6/ See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

of cases dealing with state power in Indian country.[7/]

The next two occasions this Court had to consider state power over non-Indians in Indian country also came in the context of state sales taxes, but as applied to sales by Indian sellers to non-Indian buyers. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S.463 (1976), and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), both dealt with on-reservation "smoke-shops", which had become popular revenue-raising devices for Indians because of their putative exemption from heavy state

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7/ In McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170 n.6 (1973), this Court stated that "the reasoning of Warren Trading Post cannot be so restricted [to a "preemption" analysis]," and that the result there also derived from the longstanding congressional policy of leaving reservation Indians free from state control.

cigarette taxes. In both decisions, however, this Court upheld the full range of state sales taxes and record-keeping requirements as applied to sales to non-Indians, thus effectively wiping out the price advantage the smokeshops had enjoyed over off-reservation cigarette vendors.

This Court's analysis in both cases began with the assumption that state sales taxes could validly be applied to sales to non-Indians, unless the imposition of the taxes could be shown to burden the Indian seller. In Moe, this Court placed considerable weight on the fact that the Montana tax law at issue laid the obligation to pay the tax directly on the ultimate consumer. The opinion viewed the only burden on the Indian seller to be that of collecting the tax for the state, a burden the

Court felt was "minimal." 425 U.S. at 483. The decision did not discuss the fact that enforcement of the tax eliminated the seller's price advantage with respect to cigarette sales to non-Indians.

The four tribes involved in Colville had passed their own cigarette sales tax ordinances, which had been approved by the Secretary of the Interior. They argued that those enactments preempted the state taxes. They had also made an extensive record on the economic importance of the smokeshops, as principal contributors to tribal revenue. This Court thus was obliged to address squarely the contention that application of the state tax would directly and substantially burden tribal economic interests. The Colville opinion's treatment of that argument added another element to the analysis of when state law

may apply to non-Indians in Indian country. While this Court acknowledged that the tribes had a legitimate interest in raising revenue, it viewed that interest as "strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-57. This Court noted that the smoke-shops owed their existence solely to their ability to market the supposed exemption from state taxes, not to any value "generated on the reservation by activities in which the tribes have a significant interest," id. at 155, and it was not inclined to permit the Indian country immunity from state law to be exploited for such bald economic purposes. Colville indicates that only burdens on those Indian interests that may be

regarded as "significant" will justify exemptions from state taxation of non-Indians in Indian country.

Two decisions that followed Colville by just a few months, however, indicated that, just as in Warren Trading Post, a substantial showing of congressional concern with the subject matter of the asserted state tax will, without more, sufficiently establish the "significance" of the Indian interest to preclude application of the tax.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), was a challenge to the imposition of state motor carrier license taxes and use fuel taxes on a non-Indian logging company doing business entirely on the White Mountain Apache Reservation, under contract with the tribal timber enterprise. This Court recounted at great length the nature and scope of federal regulation

and management of the timber harvesting process, and concluded that "the present case . . . is in all relevant respects indistinguishable from Warren Trading Post." Id. at 152-53. The pervasive federal involvement in the activity, the absence of any state responsibility, and the federal policy of leaving the tribe "'largely free to run the reservation and its affairs without state control,'" id. at 152 (quoting from Warren Trading Post, 380 U.S. at 690), precluded the application of the challenged state taxes.

The second case, Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980), like Warren Trading Post, involved the applicability of the Arizona Transaction privilege tax[8/] to on-reservation sales of goods by a non-Indian seller to an Indian buyer. There,

8/ See n. 5, supra.

however, the similarities between Central Machinery and Warren Trading Post ended. Central Machinery Co. was an off-reservation business, with neither a permanent place of business on the reservation nor a federal Indian Trader's license. The buyer, moreover, was not an individual Indian, but a tribal farming enterprise, which had purchased eleven farm tractors from the company. The Arizona Supreme Court had viewed those factors as sufficient to distinguish the case from Warren Trading Post, and it upheld the tax. State v. Central Machinery Co., 121 Ariz. 183, 589 P.2d 426 (1979), rev'd, 448 U.S. 160 (1980).

This Court, however, again saw Warren Trading Post as controlling, and viewed the factual differences as inconsequential to the outcome. The Indian trader statutes, 25 U.S.C. §§261-264 (1976), "plainly" governed the trans-

action, this Court said, and the company's failure to have a trader's license was irrelevant since it is "the existence of the Indian trader statutes . . . and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165 (1980). The opinion reasoned that to exempt the transaction because the seller had no place of business on the reservation would conflict with congressional intent and open the door to easy circumvention of the statutory scheme. Ibid.[9/] This Court further specifically rejected the relevance of Arizona's argument that the "legal incidence" of the Arizona tax was on the non-Indian seller, not the buyer. Id. at 164, n. 3. In Central Machinery

9/ Accord, United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978, 980-81 (10th Cir. 1978).

as in Warren Trading Post, the tax, if applied, would ultimately be borne by the Indian consumer.

Santa Ana urges that this considerable body of precedent, from Thomas v. Gay to Central Machinery, establishes a clear and consistent method of analysis for determining when state law may validly be imposed on non-Indians, their property or transactions, within Indian country, and that that analysis points easily to the proper result in the instant appeal. Such an analysis must begin with the question posed by Thomas v. Gay: does the application of the state law result in a direct or substantial burden on any Indian interest? If no Indian interest is so burdened, then under Thomas, there can be no objection to application of the state law. If there is some palpable burden on Indian interests, however,

then one must take a second step, to examine the tribal, state and federal interests involved, in the manner suggested by Warren Trading Post and Colville.

As for the second step of this analysis, Warren Trading Post establishes that where Congress, in the exercise of its special power in Indian affairs, has demonstrated clear federal concern for the burdened Indian interest, that alone will oust any state regulatory power at all. This doctrine has been referred to as the "federal preemption" test. Where the federal interest in the subject matter is less clear or absent, however, one must examine the tribal interest itself, and determine whether it is sufficiently "significant," within the meaning of Colville, to warrant an immunity from state law.

Central Machinery and White Mountain Apache both spoke in "preemption" terms, because of the evident federal concern in the areas of harvesting of Indian timber and business practices in Indian country. "Preemption," however, in this context amounts to a weighing of interests, in which strong federal concern outweighs virtually any state interest in the same activity. Had there been no clear federal concern in those two cases, however, this Court might have looked to the tribal interests in the affected activity. Were, for example, the interests of the White Mountain Tribe in the economic viability of its timber enterprise deemed "significant" in Colville's terms, the outcome of the case should be the same even without the extensive federal regulation of

the activity.[10]

II. IN LIGHT OF THE PRECEDENTS, NEW MEXICO'S ATTEMPT TO TAX LEMBKE'S PROCEEDS FOR CONSTRUCTION OF THE RAMAH SCHOOL IN THE INSTANT CASE MUST BE STRUCK DOWN.

Seen against this backdrop of authority, it seems certain that the opinion of the New Mexico Court of Appeals in the instant case must be disapproved, and the tax at issue herein held inapplicable to the proceeds derived by appellant Lembke for construction of

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10/ In White Mountain Apache, 448 U.S. at 145, this Court stated that cases of this sort will always require a "particularized inquiry into the nature of the State, Federal and tribal interests at stake," suggesting that the existence of a "significant" tribal interest may not, alone, be enough to oust state regulation. The passage indicates an approach that would weigh competing interests, as advocated by the dissent in Tiffany Const. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225, 1231 (1981) (Sosa, J., dissenting), a case raising virtually the same issue as that presented here.

the Ramah School.

A. The Court of Appeals Opinion Rests on Unsound Logic and Authorities

It is undisputed that Lembke, a non-Indian company, performed the services to which the challenged taxes pertain, entirely within Indian country, on tribal trust land on the Ramah Navajo Reservation (a satellite of the Navajo Reservation) in west-central New Mexico. Jurisdictional Statement at 15. The work was performed under a contract with appellant Ramah Navajo School Board, Inc. ("the Board"), which under federal law is deemed to be a "tribal organization." 25 U.S.C. §450b (c) (1980 Supp.); Ramah Navajo School Board, Inc., v. Bureau of Revenue, 95 N.M. 708, 625 P.2d 1225, 1227 (Ct. App. 1980), cert. quashed, 96 N.M. 17, 627 P.2d 412 (1981), cert. granted, _____

U.S. ____(1981).[11/] The Board in turn was under a contract with the Bureau of Indian Affairs. The State of New Mexico taxed Lembke's gross receipts under its contract with the Board, and the Board, as that contract required, reimbursed Lembke in full for the amount of the taxes assessed. 625 P.2d at 1227. As the Court of Appeals candidly observed, "the ultimate economic burden was on the School Board." Ibid. Yet that Court sustained the tax. Santa Ana submits that the reasoning of the Court of Appeals, and the authorities upon which it relied, must be disapproved by this

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11/ The Board is incorporated under New Mexico law as a non-profit organization, but its membership consists entirely of Navajo Indians from the Ramah "Chapter," or community. Ramah Navajo, 625 P.2d at 1227. Under New Mexico case law, a state-chartered corporation that is predominantly Indian-owned is considered an Indian for purposes of considering jurisdictional issues such as this one. Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369, 552 P.2d

Court.[12]

The Court of Appeals emphasized repeatedly throughout its opinion that under New Mexico law, the gross receipts tax has its legal incidence on the (non-Indian) seller, not the buyer (the Board). This Court, however, has specifically rejected the notion that such an argument has any relevance to the outcome of cases such as this. Central Machinery at 164, n. 3. Far more pertinent to this case is the Court of Appeals' concession, noted above, that "the ultimate economic burden" of the tax fell on the Board. Ramah Navajo, 625 P.2d at 1227.

The Court of Appeals relied heavily for its decision below on one of its own

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11/ (cont.) 805, 809 (Ct. App. 1976), cert. denied., 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977).

12/ Santa Ana takes no position on the second part of the Court of Appeals opinion, dealing with the interpretation of specific provisions of New Mexico's

prior decisions, G.M. Shupe, Inc., v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (1976), and on a federal case that also arose in New Mexico, Mescalero Apache Tribe v. O'Cheskey, 439 F. Supp. 1063 (D.N.M. 1977), aff'd, 625 F.2d 967 (10th Cir. 1980), cert. denied, 101 S. Ct. 1417 (1981). Shupe was a challenge to gross receipts taxes assessed against a contractor on its proceeds from the construction of a dam on the Nambe Indian Reservation in New Mexico. The project was built under a contract with the Bureau of Reclamation, not the Bureau of Indian Affairs. The tribe had no involvement in the project, and was not at all burdened by the tax, and from all that appears, the tax in Shupe would be entirely proper under the Thomas v. Gay

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12/ (cont.) tax statutes, and that aspect of the court's ruling is not at issue in this appeal.

exception to Worcester. The extensive Indian law discussion in Shupe, thus, seems to be entirely beside the point, and the opinion cannot be regarded as good authority for a case such as this one, where the tax burden falls entirely on an Indian entity.

The two lower court opinions in Mescalero are, admittedly, more on point. That case involved the applicability of gross receipts taxes assessed against the proceeds of construction of a resort complex on the Mescalero Apache Reservation in southern New Mexico, by non-Indian firms under contract with the Mescalero Tribe. Although this Court declined to review the decision of the Tenth Circuit, upholding the tax, it is difficult to reconcile that decision (or that of the district court, which the Tenth Circuit affirmed) with the line of

authorities discussed above in §I. And even if Mescalero were thought to be sound, its facts differ from those in the instant case in one important respect that alone ought to preclude its justifying the result reached by the court below.

Nearly all of the contractors in Mescalero had been issued federal Indian Traders' licenses by the Bureau of Indian Affairs, but the district court held the issuance of those licenses to have been beyond the government's power, and thus void. The court viewed the contractors as beyond the reach of the trader statutes, mainly because they had no permanent places of business on the reservation and because their services were sold to the tribe pursuant to complex, sophisticated contracts negotiated by attorneys and tribal and BIA officials. 439 F. Supp. at 1067-68. Although it acknowledged that the state taxes would

be passed on to the tribe, the court noted that the legal incidence of the tax was on the non-Indian contractors, not the tribe. The court characterized the economic burden on the tribe as "indirect," citing Thomas v. Gay. The Tenth Circuit opinion added nothing significant to the district court's reasoning, and affirmed it on all points.[13/]

On both questions decided - whether the Indian trader statutes could cover the transactions at issue, and whether imposition of the state taxes would, regardless, constitute an impermissible burden on significant Indian interests - the opinions in Mescalero appear to run directly contrary to relevant decisions of this Court. The district court's rationale for voiding the licensing of the contractors under the trader statutes

13/ Judges Doyle and McKay filed vigorous dissents.

was expressly disapproved by this Court in Central Machinery, 448 U.S. at 164-65, as was any reliance on the mechanical notion of "legal incidence" analysis. Id. at 164, n. 3.[14/] Warren Trading Post, Central Machinery and White Mountain, moreover, all are premised on the very sensible proposition that a tax on a transaction with an Indian buyer, that the seller will routinely pass on to the buyer as part of the buyer's cost, cannot be characterized as an "indirect" burden on the Indian within the meaning of Thomas v.

14/ The irrelevance of the "legal incidence" of the tax is likewise demonstrated in White Mountain Apache, where this Court struck down taxes that unquestionably were assessed solely against the non-Indian company. The opinion's analysis proceeds on the logical premise that such taxes would routinely be passed along to the ultimate purchaser, in that case the tribal timber enterprise, and would thereby directly burden the Indian entity. 448 U.S. at 148-50.

Gay.[15] The burden is direct, proximate, and substantial.

White Mountain and Central Machinery were decided shortly after the Tenth Circuit decision in Mescalero, and the tribe sought rehearing, arguing that the two new decisions by this Court compelled a reversal of the reasoning of Mescalero. The Tenth Circuit denied rehearing in a short opinion, in which it primarily made the point that Central Machinery dealt with a sale of "goods," while Mescalero was concerned with sales of "services". With that distinction, the court felt no need to change its earlier view of the case before it. 625 F.2d at 990.

15/In Thomas, the burden on the Indian that might have resulted from the property tax on the non-Indian cows could properly be described as "indirect" and "remote," because it merely affected the non-Indian lessee's opinion of how valuable the Indian grazing lease was to him. 169 U.S. at 273. There was no way the Indian lessor would ever have to bear the tax directly, as there is in Mescalero and in the instant case.

It is true that the Indian trader statutes frequently refer to introduction of "goods" into Indian country, see, e.g. 25 U.S.C. §§261,263,264 (1976). The statutes also refer to "trading" with the Indians, however, id. §§261-264, a term that could embrace the full scope of business dealings with ultimate consumers. Given the stated motivations behind those enactments, see Warren Trading Post, 380 U.S. at 688-690; Central Machinery, 448 U.S. at 163-65, there would seem to be little basis for distinguishing goods from services, if both could reasonably fall within the statutory terms. And that distinction in no way speaks to the matter of the burden imposed on the tribe by the taxes at issue.

There is, moreover, a significant distinction to be drawn between the facts in Mescalero and the facts of the instant

case, that would lead to disapproval of the taxes here even if Mescalero were correct. The construction project on which the taxes were assessed in Mescalero was a commercial undertaking, a luxury resort complex. Arguably, the tribe could pass the tax burden along to patrons of the resort, by raising its prices, and the tax might thus be regarded as imposing only the "indirect" burden on the tribe of making its resort that much less attractive to potential patrons. Santa Ana does not fully subscribe to that argument, however, for it ignores the fact that for many tribes, which have little or no potential tax base, commercial enterprises are of critical importance as the only means by which tribes can survive and function as viable governmental entities. Any burden on the profitability of such enterprises,

thus, directly affects the life-blood of tribal government itself. Cf. White Mountain Apache Tribe, 448 U.S. at 149 (imposition of taxes there at issue would frustrate federal policy of encouraging tribes to "revitalize their self-government"). Only where the factual record in a particular case showed that for the tribal enterprise to pass along a state tax would cause no effect on tribal revenues, should the above argument be adopted to justify the imposition of the state tax.

In the instant case, however, no such argument is available to the state. A public school board may not"pass along" taxes or other costs to anyone. Indeed, where any normal governmental function is involved, whether it be building or operating schools, building or maintaining roads or other public works, or providing other public

services, it is axiomatic that any addition to the cost of such activity constitutes a direct burden on the governmental entity at least equal in magnitude to the amount of the added cost. That certainly is what is shown by the record in the instant case.

In short, the authorities on which the court below founded its affirmance of the tax at issue here, do not warrant that court's confidence, or this Court's approval.

B. Measured by the Applicable Precedents From This Court, the Tax at Issue Herein Must Fall.

It having been shown that the reasoning of the opinion below is unsound, it remains only to demonstrate that when analyzed in accordance with the relevant decisions of this Court, as discussed, supra, in §I, the tax at issue in the instant case cannot be sus-

tained.

The initial question to be posed is whether imposition of the tax directly burdens any Indian interest. As suggested supra, pp. 31-32, the answer to that here, particularly in light of Warren Trading Post, White Mountain Apache and Central Machinery, must be in the affirmative. The taxes were passed on by Lembke directly to the Board, in the amount of at least $232,000.00. Jurisdictional Statement at 16. The record suggests that had that money not gone to reimburse Lembke for state taxes, the Board could have constructed other badly needed facilities for which it otherwise has no funds, such as a cafeteria, administrative offices, or additional classrooms. Id. at 17. The Board has been forced to pay the taxes, however, and the Ramah community is still

lacking in necessary school facilities as a result. That the taxes have imposed a direct burden, in Thomas' terms, is indisputable.

The second stage of inquiry looks to the nature of the interest impaired. Santa Ana submits that even were there no demonstrable federal concern with the taxed transaction that would, alone, oust the state from taxing power (which there is, see infra, at 39-41), the Indian interest here, by itself, would be sufficient to preclude application of the tax. That interest is the especially vital one of locally controlled education of Indian youth, in suitable physical facilities. Particularly where the State plays no role in providing that education,[16/] there can be no justification

16/ Indeed, it was the State's closing of a state-run high school at Ramah that prompted the community to organize its own school with federal assistance. Jurisdictional Statement at 15.

for the state to impair the Board's efforts to do so by levying state taxes on school construction.

In the instant case, however, this Court need not reach that issue, because congressional concerns for the Indian interests at stake here are self-evident, and these concerns should here, as in Warren Trading Post, White Mountain Apache and Central Machinery, be held to "preempt" any state taxation at all. There are two areas of clear federal concern: business activities in Indian country, and Indian education. Either should suffice to meet the test of the cited cases.

As for the first, the area of business practices, it is true that Lembke did not have a federal Indian Trader's license, but there is no apparent reason why it could not have obtained

one, nothwithstanding Mescalero. As the appellants have moreover pointed out, like the tractor purchase in Central Machinery, the construction of the Ramah School was subject to on-going BIA involvement and supervision. Jurisdictional Statement at 15-16, esp. n. 5. If Lembke's sales of goods and services to the Board can be said to be within the scope of the Indian trader statutes, 25 U.S.C. §§261-264, then this case must be controlled by Central Machinery, and the tax must be invalidated.[17/]

Federal concern in the second area, education for Navajos and other Indians, has been apparent at least from the signing of the Navajo Treaty of 1868, 15 Stat. 667, by section 6 of which the United States agreed to provide schools

17/ Central Machinery would, in fact, seem to require that no commercial sale to Indians or Indian entities in Indian country may be taxed by a state.

and teachers for all those Navajo children who could be "induced or compelled" to attend. Id. at 669. The extensive congressional legislation and regulations of the Department of the Interior that deal with Indian education generally, and with the construction of the Ramah School specifically, are detailed in the appellants' brief herein, and will not be reiterated here. It would appear, however, that federal concern in this area is more than sufficient to justify the preemption doctrine as to any state laws that burden Indian education. At a minimum, the taxes here at issue should be disapproved on that ground.

However the question is analyzed, the unavoidable conclusion must be that the State's effort to tax Lembke's receipts from construction of the Ramah School cannot be upheld in the face of

the unbroken line of decisions from this Court that have been reviewed above. Santa Ana would urge this Court to reaffirm that line of precedent, in terms, as suggested in the foregoing, that would preclude any justification for further costly and wasteful litigation in this area. In particular, this Court should reaffirm the principle of Thomas v. Gay, that a state may tax non-Indians or their property in Indian country only where the imposition of such a tax will not directly or substantially burden any significant Indian interest. That fundamental doctrine has obviously been ignored by the court below. Firm adherence to that doctrine by this Court will not only fairly serve the legitimate interests of Indian people and their governmental institutions, but will also undoubtedly promote greater mutual respect between Indian

tribes and the several states.

III. CONCLUSION

For the foregoing reasons, amicus curiae Pueblo of Santa Ana respectfully urges this Court to reverse the decision of the New Mexico Court of Appeals below, and direct that the challenged taxes be refunded to appellant Lembke.

Respectfully submitted,

LUEBBEN, HUGHES,
& KELLY
805 Tijeras NW
Albuquerque, NM
(505) 842-6123

Richard W. Hughes
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for Amicus Curiae
Pueblo of Santa Ana

Office - Supreme Court, U.S.
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No. 80-2162

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH-NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
MARIA A. IIZUKA
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a State may tax the gross receipts that a non-Indian construction contractor receives from a tribal school board for the construction of a school for Indian children on Navajo Reservation tribal trust lands, where the construction is part of a federal scheme for encouraging tribes to assume the governmental function of providing for the education of their children and where the State has relinquished the responsibility for educating the children who attend that school.

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RAMAH-NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

In response to the Court's invitation of October 5, 1981, the United States filed a memorandum at the jurisdictional stage.

STATEMENT

1. Appellant Ramah-Navajo School Board, Inc. is a nonprofit corporation organized and operated by members of the Ramah-Navajo Chapter, a local government unit of the Navajo Indian Tribe on the Ramah-Navajo Reservation (J.S. App. 44). That area, the home of approximately 2,000 Navajos, is

located some 35 miles southeast of Gallup, New Mexico.[1] The Board was organized in 1970 with the purpose of developing educational programs for Navajo children (*id.* at 45; J.A. 128). As a "legally established organization of Indians" sanctioned by the governing body of the Navajo Tribe (J.A. 31-33, 47-48, 114-116), the School Board constitutes a tribal organization for purposes of 25 U.S.C. 450b(c), a definitional provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* (J.S. App. 45).

Ramah-Navajo children of high school age had attended a small public high school near the reservation until 1968, when the State closed the school (Tr. 52, 178). The School Board was organized to provide appropriate educational opportunities for the children at an accessible school near their homes (J.A. 112). In 1970, under a grant from the Bureau of Indian Affairs, it operated a school in make-shift local facilities; but in 1973, it entered into a contract with the BIA for the design of new school facilities (Tr. 188; J.S. App. 45). In the following year, the BIA contracted with the Board for the actual construction of such facilities (J.S. App. 45). Funding for the con-

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[1] The tribal trust and allotment lands, on which the Ramah-Navajo live are not within the main Navajo Reservation, but the courts and the parties have treated the area throughout as one enjoying full reservation status (see, *e.g.*, J.S. App. 54; J.A. 32; Appellee's Motion to Dismiss or Affirm 2). The Bureau of Indian Affairs has also treated it as a reservation, establishing a Ramah-Navajo Agency with its own superintendent to coordinate federal programs affecting the Ramah Chapter of the Navajo Tribe. Department of the Interior, *Departmental Manual* at 130 DM 10.2 (1981). Cf. *United States* v. *John*, 437 U.S. 634, 648-650 (1978).

struction was provided by a series of congressional appropriations enacted specifically for this school project (J.S. App. 45-46).[2]

The contracts between the BIA and the School Board designate the latter as the design and building contractor for the project (J.S. App. 46). The Board in turn invited bids by private firms for the actual construction of the facilities, which were to be built on tribal trust lands in the Ramah-Navajo Reservation leased to the School Board by the Navajo Tribe (*id.* at 46, 47). Only two firms bid on the project, and both included the projected cost of the New Mexico gross receipts tax (current version at N.M. Stat. Ann. § 7-9-1 *et seq.* (Repl. Pamph. 1980)) in their bids (J.S. App. 47). That tax is an excise tax imposed by the State "[f]or the privilege of engaging

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[2] Department of the Interior and Related Agencies Appropriation Act, 1974, Pub. L. No. 93-120, 87 Stat. 431; Supplemental Appropriations Act, 1974, Pub. L. No. 93-245, 87 Stat. 1073; Department of the Interior and Related Agencies Appropriation Act, 1975, Pub. L. No. 93-404, 88 Stat. 810; Department of the Interior and Related Agencies Appropriations Act, 1976, Pub. L. No. 94-165, 89 Stat. 985; and Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1978, Pub. L. No. 95-74, 91 Stat. 293.

The authority for the contracts, which were executed before passage of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, was the Johnson-O'Malley Act, 25 U.S.C. 452, which authorized the Secretary of the Interior to enter into contracts with, *inter alia*, states, political subdivisions, or appropriate private corporations, agencies, or institutions, for "the education * * * of Indians" and "to expend under such contracts, moneys appropriated by Congress for the education * * * of Indians" in the particular State in question. The appellant School Board states (J.S. 15 n.4) that it incorporated under the laws of New Mexico in the belief that this was a prerequisite of contract eligibility under the Johnson-O'Malley Act.

in business," and it is a fixed percentage of the total amount of money and other consideration a firm receives in exchange for goods and services it provides to customers in New Mexico. N.M. Stat. Ann. §§ 7-9-3.F and 7-9-4.A (Repl. Pamph. 1980).

The successful bidder was appellant Lembke Construction Co., Inc., a non-Indian corporation (J.S. App. 46-47). Under its contract with the BIA, the School Board was required to insert certain clauses as to audit, pricing and the like into its contract with Lembke and to submit the Lembke contract to BIA for its review (J.A. 122). Pursuant to its contract with the School Board, Lembke has paid all taxes demanded by the State with respect to the school construction project, including the gross receipts tax; and it was effectively compensated for those payments by the School Board's payment of a contract price that included the tax (J.S. App. 46-47, 50). Lembke worked at the construction site for more than five years, beginning in 1974 (Pltf. Exhs. 29-32). Some of the new facilities opened in 1975, and by the time of the trial of this case in 1979, the schools were serving some 450 Navajo students in kindergarten through the 12th grade (J.S. App. 49; Tr. 217).[3] Completion of all the planned facilities has not, however, been financially possible (J.A. 52-57, 65-66; Tr. 118-119).

2. Appellants protested the imposition of the gross receipts tax with respect to this Indian school construction project and, in 1979, after exhausting administrative remedies, filed the present tax refund suit against the appellee New Mexico Bureau of Revenue in the New Mexico District Court of the First Judicial District (J.S. App. 44; J.A. 21-28).

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[3] Thirty-five children attend a public high school at Zuni, New Mexico, beyond the Ramah Reservation (J.S. App. 49).

Lembke agreed to pay the School Board any rebated taxes it recovered in the action (J.S. App. 48). Following a trial, the court entered judgment in favor of the Bureau of Revenue, concluding that appellants were not entitled to a refund of the protested gross receipts tax payments, which amounted to $232,264.38 by the time judgment was entered (*id.* at 48, 53-55). The court rejected appellants' contentions that the tax was barred by federal preemption under the Supremacy Clause and was an impermissible infringement on tribal self-government (*id.* at 53-54). The court relied principally on its findings that the tax did not interfere with the School Board's operation of the school facilities and that the legal incidence of the tax was on the non-Indian construction contractor, Lembke, rather than on the School Board itself (*ibid.*).

3. On appeal by Lembke and the School Board, the Court of Appeals of the State of New Mexico affirmed (J.S. App. 27-34), relying on cases holding that "a non-Indian, such as Lembke, is not exempt from state taxation because the receipts taxed were derived from activity on Indian land" (*id.* at 29; citations omitted). The court further stated, with little elaboration, that "[t]he legal incidence of the tax is on Lembke, the tax does not interfere with tribal self-government, the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax" (*id.* at 30). The court acknowledged that under the contract with Lembke "the ultimate economic burden" of the tax was on the School Board, but it found no intent revealed in the congressional appropriations for the project "to prohibit New Mexico from taxing the gross receipts of the non-Indian contractor who builds the school" (*id.* at 30-31).

Lembke and the School Board filed a motion for rehearing based on this Court's decisions in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980). The court of appeals denied the motion, stating simply that this case involved neither a "comprehensive or pervasive scheme of federal regulation" nor legislation "similar to the Indian trader statutes" (J.S. App. 36) and that its decision was supported by a footnote in *White Mountain Apache Tribe* stating: "'[T]he fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted" (J.S. App. 37, quoting 448 U.S. at 151 n.15).

On August 14, 1980, the New Mexico Supreme Court granted a petition for a writ of certiorari filed by appellants, but on March 30, 1981, it quashed the writ as improvidently issued (J.S. App. 38, 41).

SUMMARY OF ARGUMENT

A.

Under the principles applied in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the gross receipts tax at issue in this case is an impermissible exercise of state jurisdiction. The construction of federally financed Indian schools on reservations under contracts between tribally sanctioned organizations and the Bureau of Indian Affairs is part of a detailed federal scheme for encouraging tribes to take on the important responsibility of educating Indian children and for ensuring that Indian children are offered educational opportunities sufficient for their needs. States may play a role in the scheme if they wish to enter into contracts to provide for the construction of educational facilities easily

accessible to reservation children, but here the State has relinquished any responsibility for educating the children who attend the school built by appellant Lembke for the Ramah School Board. Just as the timber regulations at issue in *White Mountain Apache Tribe* precluded the intrusion of the State tax burden (including a gross receipts tax) on a non-Indian company that contracted with the tribal timber enterprise to undertake the work of logging on the reservation, at least absent any showing that the State had a legitimate interest in the logging activities beyond its generalized desire for revenue, so the relevant statutes and regulations at issue in this case preclude the exaction of the gross receipts tax at issue here. It is imposed on an activity taking place on tribal trust lands that all parties have regarded as part of the Navajo reservation; the State has shown no particularized interest in that activity other than its interest in collecting money from the construction firm; and it is disruptive of the federal purpose of ensuring adequate educational facilities for Indian children.

B.

An alternative ground for deciding the case, which might end the necessity for unlimited case-by-case litigation of the question of States' authority over activities or transactions within Indian reservations, is the proposition that on-reservation activities involving a resident tribe are presumptively beyond the reach of State law, and that the burden is on the State to demonstrate that its intrusion into reservation affairs is either condoned by Congress or justified by a compelling need to protect legitimate State interests.

This approach is a logical consequence of the Court's recent restatement of the rule that the principle of

tribal sovereignty alone—without the aid of preemptive federal legislation—can erect "an independent barrier" to State intrusion into reservation affairs. *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142. It also avoids the tension created by a focus on the pervasiveness of federal regulation as the principal barrier to State assertions of jurisdiction in a time when encouragement of tribal self-government is a primary federal policy.

Although tribal sovereignty—as the residuum of the aboriginal independence of the tribes, limited by their assumption of a dependent status vis-a-vis the United States—is, at its source, independent of federal law, some basis within the national statutory and constitutional framework must be found for its continued protection against a State's assertions of jurisdiction, which is normally complete over its territory and citizens subject only to the barriers imposed by the federal Constitution and federal law. We submit that this protection is fundamentally afforded by provisions of the Constitution, most significantly, the Indian Commerce Clause. That Clause, as its history reveals, is both the main source of congressional powers over white-Indian relations and a significant restraint on State jurisdiction over that intercourse. We would invoke the Clause only with respect to on-reservation intercourse that directly involves an Indian tribe and where the State has no real interest beyond a desire to increase its revenue. In the circumstances of this case, the Clause should provide a sufficient basis for invalidating, as an impermissible infringement on the interests it protects, the imposition of the State gross receipts tax on the payments made by a tribal organization to a contractor for building a reservation school.

ARGUMENT

A STATE MAY NOT TAX THE GROSS RECEIPTS THAT A NON-INDIAN CONTRACTOR RECEIVES FROM A TRIBAL SCHOOL BOARD FOR THE CONSTRUCTION OF A SCHOOL FOR INDIAN CHILDREN ON NAVAJO RESERVATION TRIBAL TRUST LANDS WHERE THE CONSTRUCTION IS PART OF A FEDERAL SCHEME FOR ENCOURAGING TRIBES TO ASSUME THE GOVERNMENTAL FUNCTION OF PROVIDING FOR THE EDUCATION OF THEIR CHILDREN AND WHERE THE STATE HAS RELINQUISHED RESPONSIBILITY FOR EDUCATING THE CHILDREN WHO ATTEND THAT SCHOOL

A.

1. In this case the Court must once again confront the problem of reconciling "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 165 (1973). The essential tools of analysis are readily at hand, however, in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), a case that also concerned state taxation of the dealings of non-Indians with members of the Navajo Tribe, and in two recent decisions of the Court—*White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980) —which summarize the law developed by this Court on the subject of such taxation and which, in our view, dictate reversal of the judgment below.

In *Warren Trading Post*, the Court took note of the separate and quasi-independent status of the Navajo Tribe and of the historical fact that, long before a treaty established the Navajo reservation,

indeed, "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." 380 U.S. at 686-687 (footnote omitted). See also *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886) (describing the "semi-independent position" of Indians who have "preserved their tribal relations"). Finding that an Arizona gross receipts tax on the income of a company that engaged in a retail trading business with Indians on the reservation intruded into an area that Congress had taken in hand through what are commonly known as the Indian trader statutes, 25 U.S.C. 261 *et seq.*, the Court in *Warren Trading Post* held the tax an impermissible interference with the congressional regulatory scheme. 380 U.S. at 688-691.

As the Court later explained in *McClanahan* v. *Arizona State Tax Commission*, *supra* (411 U.S. at 172), although cases such as *Warren Trading Post* concerned with the propriety of state regulation or taxation affecting Indians revealed a "trend * * * away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption[,]" the "Indian sovereignty doctrine is relevant" as "a backdrop against which the applicable treaties and federal statutes must be read." Thus, the *McClanahan* Court recognized as still fully in force the rule of *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), that a state law may be found invalid if it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them," although the rule did not itself resolve the

precise question in *McClanahan*. Accordingly, in *McClanahan* the Court read "the relevant treaty and statutes" with "this tradition of sovereignty in mind" (411 U.S. at 173), in reaching its conclusion that the State of Arizona had no jurisdiction to impose a personal income tax on a Navajo who lived on the reservation and derived her income from reservation sources.

From these and other cases the Court, in *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142, discerned "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" (*id.* at 142-143; citations omitted):

> First, the exercise of such authority may be preempted by federal law. * * * Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). * * * The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress[, but] * * * traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172, against which vague or ambiguous federal enactments must always be measured.

In *White Mountain Apache Tribe*, the Court, applying those general principles, held that a state motor carrier license tax (calculated as a percentage of gross receipts) and a use fuel tax could not be imposed

on a non-Indian logging company with respect to its activities on an Indian reservation under a contract with a tribal timber enterprise. Specifically, the Court noted (1) the existence of a detailed federal regulatory scheme governing the timber enterprise and maintenance of roads on the reservation (448 U.S. at 145-148), (2) the obstruction of that scheme through the imposition of a financial burden that would interfere both with the aim of ensuring that the timber profits "inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government" and with the discretion of the Secretary of the Interior to set appropriate fees and rates for the sale of timber (*id.* at 148-149), (3) the absence of any "legitimate regulatory interest [of the State] served by the taxes" other than "a general desire to raise revenue" (*id.* at 150), (4) the reservation situs of the activities to which the taxes were attributable, which implicated the "geographical component to tribal sovereignty" (*id.* at 151), and (5) the fact that "the economic burden of the asserted taxes will ultimately fall on the Tribe" (*ibid.*; footnote omitted).[4]

2. The principles invoked in *White Mountain Apache Tribe* and the factors singled out in its "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (448 U.S. at 145), call for a like result in the present case. In a presidential message in 1970, President Nixon, noting

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[4] In the companion case, *Central Machinery Co.* v. *Arizona State Tax Commission, supra,* the Court held that under *Warren Trading Post Co.* v. *Arizona Tax Commission, supra,* the Indian trader statutes preempted the State's jurisdiction to tax the sale of farm machinery to an Indian tribe notwithstanding the company's failure to obtain a trader's license or its lack of a permanent place of business on the reservation.

problems with Indian education in federally operated schools and with the channeling of federal funds to serve the needs of Indian children in public schools, announced a policy of encouraging Indian tribes to "control [their] own Indian schools." 6 Weekly Comp. of Pres. Doc. 894, 899-900 (1970). The President referred to the beginnings of the Ramah-Navajo School Board's efforts to provide reservation educational facilities as one of several "notable examples of schools which have recently been brought under local Indian control." *Id.* at 899.

That policy of federal assistance to and encouragement of local Indian control of the education of reservation children subsequently was expressed in the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and, most specifically, in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* (hereinafter the "Self-Determination Act"). While acknowledging the historic federal responsibility for Indian education,[5] Congress

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[5] In Article VI of the Treaty Between the United States and the Navajo Tribe of Indians of June 1, 1868, 15 Stat. 669, the United States made specific promises to the Navajo respecting the education of their children:

> ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished,

nonetheless recognized the importance of fostering "parental and community control of the educational process" among "the Indian people." 25 U.S.C. 450 (b)(3). The Act accordingly provided for contracts with the Secretary of the Interior or his delegees similar to those which the BIA had entered into with the School Board respecting the congressional appropriations for the Ramah school facilities. 25 U.S.C. 450f. It also empowered the Secretary to promulgate appropriate regulations for achieving the purposes of the Act (25 U.S.C. 450k); and the Secretary has issued detailed regulations applicable to "school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations." 25 C.F.R. 274.1.[6]

3. These statutes and regulations do not, in all circumstances, oust the States from any role in the education of Indian children or the construction of schools for them. Indeed, the potential for State participation in the task was expressly recognized in the Johnson-O'Malley Act, 25 U.S.C. 452 *et seq.*, and that option was continued in the Self-Determination Act, which authorizes the Secretary to enter into con-

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who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

[6] The definitional section of the regulations makes it clear that the regulations apply to organizations such as the Ramah-Navajo School Board, which was operating a school for Indian children in make-shift facilities at the time of its application for a grant to construct new facilities. 25 C.F.R. 274.3(n). It is, of course, irrelevant that the Ramah-Navajo School is operated by a tribal organization rather than the Tribe itself. See *Central Machinery Co.* v. *Arizona State Tax Commission, supra*, 448 U.S. at 164 n.3.

tracts with any State education agency or school district for the purpose of, *inter alia*, assisting it in the construction of school facilities near Indian reservations to serve the reservation children. 25 U.S.C. 458. But where, as here, the State has not sought to assume that role, and an Indian organization has taken on the responsibility itself in partnership with the federal government, federal preemption follows under the principles applied in *White Mountain Apache Tribe* v. *Bracker*, *supra*.

First, the federal regulations governing school construction contracts between the Secretary (acting through the BIA) and tribes or tribally sanctioned organizations are comprehensive and provide for BIA review and monitoring of construction agreements (treated as subcontracts by the regulations) under which tribal groups pay federal funds to private construction firms for the actual design and building of school facilities. 25 C.F.R. Part 274.[7] For example, any Architect/Engineer agreement entered into by a tribal contractor must be approved by the BIA (25 C.F.R. 274.31), as well as all plans and specifications (25 C.F.R. 274.32(c)); all subcontracts must include Indian preference hiring provisions (25 C.F.R. 274.38(c)); and during the term of the tribal organization's contract with the BIA, the organization must maintain records to permit audits by the Secretary's representatives of,

[7] Although these regulations were issued after the formation of the contract between BIA and the School Board, they clearly empower the BIA to monitor the construction agreements with Lembke. And it is irrelevant whether the record shows actual monitoring by the BIA of the School Board's contractual relationship with Lembke, since it is the *existence* of federal regulatory authority rather than its actual exercise that preempts state jurisdiction. *Central Machinery Co.* v. *Arizona State Tax Commission*, *supra*, 448 U.S. at 165.

inter alia, any matter pertinent to any subcontract (25 C.F.R. 274.41(a)).

Second, the chief purpose of the Self-Determination Act and its implementing regulations is to ensure that Indian children enjoy "educational services and opportunities" adequate in "quantity and quality" to permit the children "to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. 450a(c). The State's exaction of a tax that, notwithstanding its formal imposition on the private contractor, depletes the funds provided for construction of an Indian-operated reservation school, obviously impedes this goal. That the relevant statutes and regulations do not expressly bar such a tax is no basis for finding the tax permissible. As this Court noted in rejecting a similar contention in *White Mountain Apache Tribe*, "[i]n a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." 448 U.S. at 151 (citations omitted).

Third, the State has not identified any state interest in taxing the gross receipts attributable to the construction of the Ramah school buildings other than its desire to increase its general revenues. Its references to various state expenditures that might benefit the Ramah-Navajo (Appellees' Motion to Dismiss or Affirm at 6; Tr. 250-252, 267-311) do not suggest any specific connection to school construction on Indian lands; and New Mexico has not explained why it, unlike Arizona in *White Mountain Apache Tribe*, has jurisdiction to charge contractors for the privilege of doing business on what the State concedes is an Indian reservation. Of course, circumstances would be

different had the State shared the responsibility for constructing the school facilities in question or for providing for the education of the children who attend school there.

Finally, the decisions of the courts below assume that the school construction at issue here is an on-reservation activity, but they decline to accord any significance to that factor. This refusal to give any weight at all to the "significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry" (*White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 151), is plainly at odds with the precedents of this Court.

B.

We have made our submission that an application of the factors considered in *White Mountain Apache Tribe* and other cases involving state assertions of jurisdiction over reservation activities require the conclusion that the tax at issue here is impermissible. Although we believe that approach is fully sufficient to dispose of the present case, the Court may wish to consider a somewhat broader principle that compels the same result. We suggest it here because it is apparent that State courts and lower federal courts are not always able to discern the teaching of this Court's precedents when they turn on a "particularized inquiry," with few general guidelines. As one member of the Court has written, "a well-defined body of principles is essential to end the need for case-by-case litigation which has plagued this area of the law for a number of years." *Washington* v. *Confederated Tribes*, 447 U.S. 134, 176 (1980) (opinion of Rehnquist, J.). Without attempting to revive "[t]he conceptual clarity of Mr. Chief Jus-

tice Marshall's view in *Worcester* v. *Georgia*" (*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973)) or his "platonic notions of Indian sovereignty" (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973), it may yet be possible to articulate a more modest general rule for determining when State regulation or taxation of activities or transactions within an Indian reservation are permissible.

1. We suggest that the basic approach in respect of on-reservation activities involving the resident tribe must be that they are presumptively beyond the reach of State law, and that the burden is on the State to demonstrate that its intrusion into reservation affairs is either condoned by Congress or justified by a compelling need to protect legitimate State interests. We put to one side situations in which the tribe is not directly implicated—whether a crime where both offender and victim are non-Indians (*e.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1882)), or property taxes are assessed against non-Indian property (*e.g.*, *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885)). So, also, we except cases in which the reservation situs is merely a pretext for avoiding State jurisdiction (*e.g.*, *Washington* v. *Confederated Tribes*, *supra*). But, when the tribe is an active partner in activities or transactions that occur within an Indian reservation and that are tied to the locale, the presumption, at least, ought to be that State regulation is out of bounds. And this principle, it seems to us, applies with equal force whether the State's interference is so tailored that the legal incidence of the burden falls on the tribe or its non-Indian contractor, the practical effect being the same. This is, indeed, the teaching of the seminal modern case, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), treating

it as "immaterial" to the ouster of State jurisdiction over an on-reservation sale that one party to the transaction was a non-Indian. See, also, *Warren Trading Post* v. *Arizona Tax Commission, supra; White Mountain Apache Tribe* v. *Bracker, supra; Central Machinery Co.* v. *Arizona State Tax Commission, supra.*

2. While the rationale has not always been clear, for the most part, the decisions striking down State taxation of on-reservation activities involving Indians rely on the pre-emptive force of treaties or statutes, read generously in light of the tradition of Indian sovereignty. Most recently, however, the Court has explicitly recognized that, in some circumstances, the principle of tribal sovereignty alone —without the aid of pre-emptive federal legislation— can erect "an independent barrier" to State intrusion into reservation affairs. *White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. at 142. That approach, we submit, provides a clearer guide for decision of cases like the present one.

One obvious advantage of reliance on the Indian sovereignty doctrine is that a relatively uniform set of rules can be developed. Since the residual sovereignty of every Indian tribe is presumptively alike, and does not derive from federal delegation (see *United States* v. *Wheeler,* 435 U.S. 313 (1978)), it should no longer be necessary to eke out pre-emptive meaning in the particular provisions of disparate treaties, enabling acts, other federal statutes, or implementing regulations. So, also, stressing tribal sovereignty rather than federal preemption avoids the awkward tension created by the focus on the pervasiveness of federal regulations as the principal barrier to State assertions of jurisdiction in a day when the Political Branches are committed to en-

couraging tribal self-government, in part by loosening federal control of reservation affairs, and when the Court is repudiating the "federal instrumentality" doctrine as a shield against State interference. In our view, the "infringement" principle provides the firmer footing for recognizing both subsisting tribal sovereignty over its diminished territory and limited immunity from State regulation or taxation of reservation affairs involving the tribe.

3. There is, of course, no mystery about the source of tribal sovereignty: it is the residuum of the aboriginal independence of the tribes, limited by their assuming a dependent status vis-a-vis the United States and reduced in particular matters by subsequent Congressional action. See *United States* v. *Wheeler, supra,* 435 U.S. at 322-328; *Washington* v. *Confederated Tribes, supra,* 447 U.S. at 152-154. There is, accordingly, no need to identify any delegation of powers or grant of immunities in federal legislation. But the question remains how tribal sovereignty is protected against a State's assertions of jurisdiction, normally complete over its territory and its citizens, subject only to the barriers imposed by the federal Constitution or federal law.

One answer may be that federal recognition of Indian tribes and of their territory, whether by treaty or otherwise, impliedly insulates reservation affairs from undue State intrusions. For our part, however, we believe there is a *constitutional* barrier to State interference with tribal activities within their diminished territory, a barrier which Congress is free to lift in part or altogether, but which otherwise preserves a measure of tribal sovereignty over both members and defined territory. This, we believe, is reflected in the Treaty Clause, the Supremacy Clause, which "adopted and sanctioned the previous

treaties with Indian nations" (*Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)), and the exclusion of "Indians not taxed" residing within State boundaries from the population base used to apportion Representatives (Article I, Section 2, Clause 3; see, also, Amend. XIV, Section 2). But, especially in the present context, the most important constitutional text is the Indian Commerce Clause, which, as its history reveals, is both the primary source of Congressional power over white-Indian relations and an important restraint on State jurisdiction over that intercourse.

Before the Constitution, there had been much vying between the States and the national Congress over authority to deal with the Indian tribes. The matter was ambiguously compromised in the Articles of Confederation, which, in Article IX, granted Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but then exempted Indians who were "members of any of the States" and purported to preserve "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, that was an "endeavor[] to accomplish impossibilities." He construed the new Indian Commerce Clause as resolving the dilemma by giving the national government exclusive authority over intercourse with the Indian tribes, whether within the States or elsewhere. *Ibid.* Although it was not always followed in practice, Madison's view, not surprisingly, has generally been accepted as sound constitutional doctrine.

Indeed, during the ensuing century, this Court expressly asserted that "there can be no divided authority" between federal and State governments in Indian affairs. *The Kansas Indians*, 72 U.S. (5

Wall.) 737, 755 (1867). And, after reviewing the history of the Indian Commerce Clause as intentionally altering the scheme of the Articles of Confederation, the Court concluded that "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). See, also, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-418 (1866).

In sum, the Indian Commerce Clause effectively "nationalizes" our relations with the Indian tribes. Not only is plenary power over that intercourse given to Congress; the States surrendered what prerogatives they previously claimed in this area, subject, of course, to any re-delegation of authority (see, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979)). Hence, for instance, the "rudimentary proposition"—applicable even independently of the Non-Intercourse Acts—that Indian title can be extinguished only by federal consent and not by unauthorized State action. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974).

The Indian Commerce Clause assigns to the Nation, rather than the States, responsibility for Indian affairs, including the intercourse between Indians and non-Indians. It also confirms the dependent status of tribes vis-a-vis the United States. At the same time, however, that Clause—together with the other constitutional provisions already noted—impliedly recognizes the Indians living in tribal relations within their territories as separate sovereignties, protected against interference by all but the national government. As the Court has recently observed, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington* v. *Confederated Tribes*, *supra*, 447 U.S.

at 154. Thus, in both respects, the Indian Commerce Clause is a bar to State assertions of jurisdiction except by leave of Congress.

4. To be sure, history has blurred the line somewhat. As the Court has written, "[i]t can no longer seriously be argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington* v. *Confederated Tribes, supra*, 447 U.S. at 157 (citation omitted). But in the same decision the Court made clear that the Indian Commerce Clause has not been taken "entirely out of play in the field of state regulation of Indian affairs" (*id.* at 148). Accordingly, we deem it open to us to suggest that this unaltered constitutional text remains a significant impediment to State intrusion into reservation matters which do not implicate important State interests.

We do not attempt here to elaborate the present force of the Indian Commerce Clause. Suffice it to say that we invoke it only with respect to on-reservation intercourse which directly involves an Indian tribe and in circumstances where the State has no real interest—except only raising revenue. We do not construe that Clause as a bar to State regulation of non-Indians on non-Indian land within a reservation when their activities do not involve the tribe or significantly impinge on tribal interests. *E.g.*, *Montana* v. *United States*, 450 U.S. 544, 557-567 (1981). Nor do we assert that the Clause prevents the State from performing a role in Indian affairs, even Indian education, when Congress chooses to invite its participation and that invitation is taken up. Here, however, the State of New Mexico is not seeking to enter the Reservation through the door left open to it, but rather to breach the wall for wholly different

purposes. In our submission, the constitutional compact entered into between the original States, for themselves and all later States admitted on an equal footing, assigned to the National Government the sole prerogative to regulate commerce with the Indian tribes, unless and until Congress determined otherwise. That understanding, we suggest, governs this case.

CONCLUSION

The judgment of the Court of Appeals of the State of New Mexico should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
MARIA A. IIZUKA
Attorneys

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BNA'S LAW REPRINTS EDITORIAL NOTE: THE MOTION OF THE SOLICITOR GENERAL FOR LEAVE TO FILE THE SUPPLEMENTAL BRIEF AS AMICUS CURIAE WAS DENIED BY THE COURT ON APRIL 19, 1982, BUT IS INCLUDED HERE IN THE INTEREST OF PROVIDING A COMPLETE RECORD.

MOTION FILED
APR 14 1982

No. 80-2162

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2162

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION OF THE UNITED STATES FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, as amicus curiae, moves the Court for special leave to file a supplemental brief in this case.

1. On October 5, 1981, the Court invited the Solicitor General to state the views of the United States. In response, we urged the Court to note probable jurisdiction and finally to decide the controversy. Probable jurisdiction was noted on November 30, 1981. Because of the special responsibilities of the United States in Indian affairs, we submitted a brief on the merits in support of appellants. We took that occasion to suggest that the Court might wish to revisit the Indian Commerce Clause

as supplying a controlling rule, absent clear legislative guidance, in cases like the present.

2. Appellee State of New Mexico and seven other States have filed briefs urging affirmance. In each of these submissions there is a plea to the Court to seize the present opportunity to announce a broader and clearer rule to govern future cases. The major amicus brief supporting affirmance expressly joins issue with the United States as to what such a rule should be. See Brief of the States of Montana, Arizona, Nevada, Washington, and South Dakota as Amici Curiae at 11-17. Should the Court accept that invitation, it ought to have the benefit of the views of the United States articulated in less abbreviated form than in the brief now on file. Cf. *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368 n.3 (1977); *id.* at 384-385, 392-393 (Marshall, J., dissenting).

3. After the United States filed its brief, the Court rendered two decisions of arguable relevance here: *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982); *United States* v. *New Mexico*, No. 80-702 (Mar. 24, 1982). We would take this opportunity, if leave is granted, to comment on those cases as they may offer guidance here.

4. In all the circumstances, we believe the proposed supplemental brief will contribute to the Court's consideration of the issues presented.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2162

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

For some years, the Court has eschewed "treacherous generalizations," including any constitutional ruling, in Indian cases, deciding each of them on a "particularized inquiry" of competing governmental interests and examining often ambiguous provisions of treaties, statutes and regulations for preemptive intent. But the upshot is that State courts and lower federal courts are apparently at sea in their attempt to apply this Court's recent precedents to a variety of contexts. In consequence, controversy abounds and all courts—including this Court—are burdened with more litigation in this area than is necessary or salutary. Moreover, the prevailing uncertainty embar-

rasses the conduct of all three governments involved, tribal, state and federal, creates needless friction, and is likely to deter future on-Reservation investment and commercial arrangements. In this situation, we join the affected States in urging the Court to declare more broadly the controlling principles.

A.

1. The State of New Mexico, joined by a number of other States, would ask the Court to enact an unbending "legal incidence" test, permitting the State to tax any non-Indian doing business within State boundaries with tribal Indians, whether on or off their reservation, and regardless that the economic burden falls on the tribe, inhibits tribal taxation, and impairs the ability of the tribe to perform governmental functions. Only "a *clear* expression of congressional intent" to the contrary would overcome this "presumption." See Brief of the States of Montana, et al., at 16. This approach invokes *Thomas* v. *Gay*, 169 U.S. 264 (1898), as the last word on the subject, except only for the rejection of the "federal instrumentality doctrine" as a bar to State taxation of non-Indian contractors dealing with the United States or Indian tribes. And, predictably, the Court's recent decision in *United States* v. *New Mexico*, No. 80-702 (Mar. 24, 1982), will be invoked as announcing the controlling rule, the suggestion being that a tribe's commercial partners ought fare no better than those who contract with the United States. See Brief of the State of New Mexico at 13-16; Brief of the States of Montana, et al., at 6-7, 9-10, 16-17; Brief of the State of California at 6.

In sum, the States filing here would read the final concurring and dissenting opinion in *Washington* v. *Confederated Tribes*, 447 U.S. 134, 176-186 (1980), rather than the opinion of the Court (*id.* at 154-159), as announcing the governing principles, and would dismiss as aberrations the subsequent decisions in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Cen-*

tral Machinery Co. v. *Arizona Tax Commission*, 448 U.S. 160 (1980).

2. Unsurprisingly, we cannot agree that the Court ought to extend *Thomas* v. *Gay*, a decision written at a time when Indian reservations were destined for extinction, and condoning only a tax on non-Indian cattle located on leased land within a reservation, with no subsequent tribal involvement. On the other hand, we do not question the Court's ruling in the *Colville* case, which we read as a brake on the abusive exploitation of a tax exemption. Indeed, we suppose the Court might well reach a like result with respect to sales from a post exchange on a military reservation over which the United States had retained exclusive jurisdiction if all residents of the State were indiscriminately invited to purchase tax-free cigarettes there and take them off the base for consumption elsewhere. Cf. *United States* v. *Mississippi Tax Commission*, 412 U.S. 363, 377-378 (1973). But we view *Colville* as announcing an *exception*, not the general rule.

The basic principle, we submit, is that, absent clear congressional authorization, the State may not tax or regulate transactions or activities directly involving tribal Indians on their reservation, at least when that situs is not merely a device for avoiding otherwise applicable State jurisdiction. When it applies, this immunity, we believe, embraces the entire transaction or activity, not merely the Indian partner. The question remains: Where does such a rule come from?

One approach is to view the establishment of Indian reservations as the setting aside of an enclave presumptively off limits to State law. Except as Congress has expressly provided otherwise, the organic act defining reservation boundaries may be deemed to confer a federal protective umbrella that shields tribal activities there—including commerce with non-Indians—from State interference. To be sure, unless particular treaties effectively so provide, or disclaimer provisions of State Enabling

Acts are so construed, or pervasive Federal regulations fully occupy the field, this requires the Court to imply a general congressional intent to preempt State law. Even so, given the "backdrop" of tribal territorial sovereignty, that may well be a permissible inference.

3. For our part, however, we believe there is no need to surmise what Congress intended where it has not spoken clearly. More appropriately, we suggest, the Court ought to declare the underlying constitutional rule applicable "absent governing Acts of Congress" (to borrow the words of *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)), leaving to Congress—where it has not yet clearly spoken—the task of making any accommodations it deems wise as a matter of policy. Cf. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 16-17. Accordingly, we once again raise the banner of the Indian Commerce Clause, emboldened by the Court's most recent opinion in which the Clause is given honorable mention and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), is apparently restored to full standing as a seminal precedent. See *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 22, 27-28.

We stress that "constitutionalizing" the rule would not "freeze" the matter, nor in the least inhibit needed accommodations. We read the Indian Commerce Clause as deciding no more than that all intercourse between tribal Indians within their reservations and outsiders is, presumptively, an exclusive federal concern, in which the States are off limits, *until and unless Congress determines otherwise*. But, in our view, Congress has unfettered discretion to share that responsibility with States, or to cede or transfer it altogether——as, indeed, has been done in some cases. In sum, all we say is that the Constitution requires congressional leave before the States intervene in Indian affairs. Our submission in no way prevents Congress from experimenting with various schemes of power sharing, or from changing the policy if any program proves unworkable or unwise or unjust.

Our argument is hardly novel. It is well settled that, so long as Indians choose, and are permitted, to retain their tribal relations, within a defined territory recognized as their domain by the national government, State authority over tribal activities there is out of bounds, except as Congress has, in particular cases and particular matters, ordained otherwise. Most relevantly, States cannot regulate or tax reservation members, whether their transactions are with each other or with outsiders, and regardless whether they are buyers or sellers. And this absence of State authority does not appear to depend on any special provision of federal treaty or statute.[1] Why should not the same principle equally exempt the non-Indian partner to the same transaction?

The Indian Commerce Clause, we suggest, supplies a firm basis for that result. Once the federal instrumentality doctrine is discarded, it is not entirely clear why "pervasive regulation" by the federal government suffices to immunize the transaction. After all, the reason for the exemption is presumably to protect *tribal* interests, which would be the same if federal officials released their control and left tribal authorities free to

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[1] Although the Court, in recent years, has avoided any very explicit reliance on the Constitution in Indian cases, constitutional doctrine, including the Indian Commerce Clause, may nevertheless supply a relevant backdrop. The Court has said that "absent cession of jurisdiction or other federal statutes permitting it, there [is] no satisfactory authority for [States] taxing * * * Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Yet, States surely have ample authority to tax the income of all residents unless federal statutes *prevent* it, or unless some constitutional rule requires congressional consent. So, also, how can non-statutory "rudimentary principles"—unless confirmed by the Constitution—disable States from acquiring Indian land within State boundaries? See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974).

make their own arrangements—as current policy suggests. One day, it may be hoped, much of Title 25 of the United States Code and the implementing regulations will be repealed, or amended to relax the heavy hand of the federal bureaucracy in favor of Indian self-determination. Must the consequence be to remove the shield that protects the Tribes from more hostile State interference?

As that day approaches—and even now—it becomes important to revisit the Indian Commerce Clause, which, only this Term, the Court characterized as "a shield to protect Indian tribes from state and local interference." *Merrion* v. *Jicarilla Apache Tribe*, *supra*, slip op. 22.

B.

It may be said that we attempt to rest too large a burden on a very narrow footing. Indeed, the Indian Commerce Clause hardly enjoys a place of prominence. On its face, and positioned as it is in the Constitution, the Clause might seem to be a "tag-end" provision, presumably an afterthought. But, when we examine its pedigree, we see that the Indian Commerce Clause is no accident and no weakling.

1. Few things are clearer in our early history than the long and hard, but ultimately successful, effort to nationalize Indian affairs—as a matter of *constitutional law*. Many of the Founding Fathers, Franklin, Washington, Dickinson, Wilson, and Madison, among others, committed themselves to the difficult task, beginning as early as the Albany Congress of 1754 in colonial times,[2] persisting

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[2] The Albany Plan of Union, approved by the colonial Commissioners in July, 1754, and largely drafted by Franklin, would have committed to a general government of the united colonies (consisting of a President-General and a Grand Council) the powers of—

> [H]old[ing] [and] direct[ing] all Indian Treaties in which the General Interest or Welfare of the Colonies may be concerned * * *;

through the regime of the Continental Congress,[3] and continuing through the Constitutional Convention. As one

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> [M]ak[ing] Peace or declar[ing] War with Indian Nations;
>
> [M]ak[ing] all purchases from Indians for the Crown, of Lands now not within the bounds of particular Colonies or that Shall not be within their Bounds when some of them are reduced to more Convenient Dimensions; and—
>
> [M]ak[ing] such Laws as they judge necessary for regulating all Indian Trade.

R. Newbold, *The Albany Congress and Plan of Union of 1754* 186 (1955).

The Plan was rejected or ignored by the Colonial Legislatures and, accordingly, was never enacted by the British Parliament. *Id.* at 135-173. But British attempts to centralize Indian affairs continued until the Revolution. See F. Prucha, *American Indian Policy in the Formative Years* 11-25 (1962).

[3] As early as July, 1775, the Continental Congress sought to take national control of Indian affairs, appointing special commissioners for the purpose, among them Franklin and James Wilson. *Journals of the Continental Congress*, 1774-1789, II, at 174-177, 183 (Lib. of Cong. ed. 1904-1937). The initial drafts of the Articles of Confederation, proposed by Franklin in mid-1775 (*Journal, supra*, II, at 195-199) and, a year later, by John Dickinson (*id.*, V, at 546-554), suggested nationalizing Indian affairs. Indeed, the latter would have unambiguously given Congress "the sole and exclusive Right and Power of * * * Regulating the Trade, and managing all Affairs with the Indians" (*id.*, V, at 550). Wilson, among others, supported the provision (*id.*, VI, at 1077-1079), but State jealousies required compromise. By August 20, 1776, the Indian Article had been qualified to exempt from congressional control relations with Indians deemed "members of any of the States" (*id.*, V, at 682), and, by the end of October, 1777, the ambiguous proviso saving "the legislative right of any State" had been added (*id.*, IX, at 844, 845). Those amendments were retained when, two weeks later, Congress approved the Articles of Confederation. *Id.*, IX, at 907, 919. See, also, M. Jensen, *The Articles of Confederation* 134-135, 152-155, 159 (1940); G. Harmon, *Sixty Years of Indian Affairs* 1-9 (1941).

The experience of divided authority under the Articles only strengthened the resolve of those like Washington and Madison and Henry Knox, who believed Indian affairs ought to be committed exclusively to the national government. See Prucha, *supra*, at 32-40; Harmon, *supra*, at 10-12.

distinguished historian of our early Indian policy has written, among American statesmen dedicated to the principle of Union "there was fundamental agreement that Indian affairs was one area that belonged to the central government." Prucha, *supra*, at 29. From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to *disable* the colonies or States from doing so. If, as we submit, the architects of the Constitution eventually succeeded, that achievement ought not lightly be cast aside.

2. The first resolution of the question, in the Articles of Confederation, was somewhat ambiguous. While the Congress was expressly granted "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the [I]ndians," this was limited to Indians "not members of any of the states," and qualified by a proviso preserving "the legislative right of any state within its own limits." Art. 9, *Journals of the Continental Congress*, 1774-1789, IX, at 919 (Lib. of Cong. ed. 1904-1937). This apparent contradiction led to many disagreements, as Madison later observed. *The Federalist* No. 42, at 284 (J. Cooke ed. 1961). The Continental Congress asserted exclusive power, insisting in a Committee Report issued in August 1787, that States ought to "accede to Congress's managing, exclusively, all affairs with * * * independent tribes within the limits of the * * * States, * * * [including] the * * * power of regulating trade * * *." *Journal*, *supra*, XXXIII, at 455, 460. But some States disputed this view and proceeded unilaterally to deal with the Indians.

It was in this setting that Madison proposed a stronger provision at the Constitutional Convention—two weeks after the Report just quoted. He urged expressly giving Congress unrestricted power "[t]o regulate affairs with the Indians, as well within as without the limits of the United States." M. Farrand, *The Records of the Federal Convention of 1787*, II, at 321, 324 (1966). Although this language was substantially revised and removed to its present place in the Commerce Clause, there is not

the slightest indication that the ultimate short-hand did not carry the full scope of Madison's original proposal. See Farrand, *supra*, II, at 493, 495, 497, 499, 503, 569, 595. On the contrary, it is significant that an intervening attempt to qualify federal power by confining it to "Indians, within the Limits of any State, *not subject to the laws thereof*" (Farrand, *supra*, II, at 367; emphasis added), was rejected—presumably because it was seen as reintroducing the concept of divided authority which caused difficulties under the Articles of Confederation.[4]

3. But we need not guess about it. That the advocates of nationalizing the Indian affairs eventually achieved their goal is attested by Madison, by President Washington, by several decisions of this Court, the first written by Chief Justice Marshall, and by the pattern of Congressional legislation and Executive action since that time. The prevailing view has been that, under the Constitution, Indian affairs—like naturalization or foreign affairs—are committed exclusively to the federal government, the role of the States being only such as they may undertake at the invitation of Congress. And, at least in the first century of our constitutional history, this federal monopoly of power was understood to focus on that potentially most troublesome subject, intercourse between tribal Indians and other citizens. Governmental interference in internal tribal affairs was not the issue. See *Ex parte Crow Dog*, 109 U.S. 556, 571-572 (1883). Nor was the primary controversy in respect of taxation of reservation Indians or civil or criminal jurisdiction over them. The main objective of the Indian Commerce Clause

[4] The quoted proposal was reported by the five-member Committee of Detail which did not include Madison (Farrand, *supra*, II, at 97, 106, 321, 325, 366-367). Consideration was postponed (*id.*, II, at 368), the question was recommitted to a Committee of Eleven, including Madison (*id.*, II, at 473, 481), and the present provision then emerged (*id.*, II, at 493, 497), and was agreed to unanimously (*id.*, II, at 495, 499). It would not be fanciful to surmise that, given his strong views on the matter, Madison was responsible for deleting the ambiguous qualification.

was to resolve, in favor of exclusive national power, the dispute as to regulation of dealings between Indians and non-Indians. Until the 1880's, that was the core of "Indian affairs."

We have already noticed Madison's praise of the Indian Commerce Clause in *The Federalist* No. 42, *supra* as granting the national government a power "very properly unfettered from two limitations in the articles of Confederation." President Washington, viewing Indian relations as an exclusive federal concern, repeatedly sought, and obtained, legislation regulating the Indian trade and the traders, ultimately persuading Congress to create the "factory system" of governmentally-operated trading posts. See Prucha, *supra*, at 43-50, 53-54, 61-62; see, also, Harmon, *supra*, at 12, 25, 94-99. That remained the approach of succeeding Presidents, exercising the treaty-making power to deal with Indian affairs, and later acting simply by Executive Order. And, of course, the Congress has never felt restrained by any notion of concurrent State authority in regulating Indian intercourse. On the contrary, the Legislative Branch has consistently acted on the premise that where exercise of State jurisdiction over any aspect of Indian affairs was desirable, a cession or transfer of federal authority was necessary.

4. This Court, also, repeatedly declared the exclusive national authority over Indian affairs. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall, after noting the "ambiguous phrases" of the Articles of Confederation, which imposed on the federal power "shackles * * * discarded" in the Constitution, concluded that the "whole power of regulating the intercourse with [the Indians] was vested in the United States." *Id.* at 558-560. See, also, *id.* at 561; *id.* at 590-592, 594 (McLean, J., concurring). Several decades later, the Court repeated the point, expressly stating that "there can be no divided authority" in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866). And, still later, in the specific context of restrictions im-

posed on white traders to the Indians, the Court characterized the power of Congress to regulate commerce with the Indian tribes as "exclusive and absolute." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

In the face of an unchanged constitutional text, it seems a little late in the day to weigh in against such an established consensus and ask the Court to repudiate the constitutional settlement reached two centuries ago.

C.

The argument persists, nevertheless, that the Indian Commerce Clause is an anachronism, written for a day when Indian Tribes were more like foreign nations, living beyond the "frontier," so that it would be inappropriate to invoke the provision in the very changed circumstances now prevailing. We turn to that objection.

1. Of course, our intercourse with the Indian Tribes has altered in two centuries. What has not? But the differences between now and then are not as great as might be assumed, and neither the legal status of the Tribes, nor the reasons behind the decision to nationalize our relations with Indians, have changed very much.

First, although Indian Tribes two hundred years ago occupied far larger territories, a number of them resided within State boundaries. The Constitution itself sufficiently attests to the fact by excluding "Indians not taxes" from the enumeration of State inhabitants used for the purpose of apportioning seats in the House of Representatives. Article I, Section 2, Clause 3. And (as we have seen), the main point of disagreement resolved by the Indian Commerce Clause was control of intercourse with tribal Indians residing "within the States." Nor was "Indian Country," even then, without more or less permanent non-Indian residents. There were already agents, teachers, missionaries, traders, and even unwanted settlers, in the territory of many Tribes.

At the time the Indian Commerce Clause was written, experience had shown that the States were unable or unwilling effectively to control the abuses of local citizens in their dealings with the Indian Tribes, and, in some cases, the States themselves were engaged in treating with the Indians on terms that did not serve the national interest. This is what led many to conclude that the only hope of establishing a just and consistent policy in Indian affairs was to commit the power and responsibility exclusively to the control of the national government. In this Court, it ought not be necessary to argue that, still today, that problem is with us. We need not remind the Court how often, and how recently, it has been called upon to intervene—not uncommonly at the instance of the United States—when States failed to respect or protect tribal rights and immunities, whether with respect to land, or water, or fishing, or self-government, or taxation.[5]

This is not to deny that one of the motives for centralizing Indian affairs—fear that locally sanctioned abuses would provoke powerful Tribes into hostile acts or unfriendly alliances—has disappeared. Or that the commodities of trade—once largely furs and pelts and horses in one direction, guns and whiskey in the other—have changed. But whether informed by considerations of national defense, or self-interest, or simple justice, the constitutional rule federalizing regulation of Indian commerce has never lacked a firm basis.

2. At all events, as we have seen, the Court continued, at least until 1876, to read the Indian Commerce Clause

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[5] Long after the adoption of the Fourteenth Amendment—including the Equal Protection Clause that embraces non-citizens—this Court summarized the situation of Indian tribes within State boundaries: "They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). Unfortunately, that reality is not everywhere ancient history.

as an independent barrier to State interference in Indian affairs. This has led some to suggest that, although in force for a century, the constitutional rule changed about a hundred years ago. See Brief of the States of Montana, et al., at 12.

It is true, of course, that a new approach to Indian affairs was inaugurated by Congress in the 1880's. The first step was more pervasive federal intrusion in reservation affairs, including, for the first time, imposition of the white man's criminal law on offenses committed by one Indian against another. See *United States* v. *Kagama*, *supra*.[6] And this was shortly followed, in the General Allotment Act of 1887, by a scheme ultimately designed to "assimilate" the Indian and subject him to State law. It is familiar history that these policies persisted until the late 1920's and effectively opened up many Indian reservations to white settlers. So, alone, more recent legislation, including Public Law 280 in 1953 and subsequent Termination Acts, renewed the trend for a short span. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). The upshot is that some Indian reservations were disestablished (*e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), many were diminished in extent (*e.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)), and a substantial number of non-Indians acquired tracts and took up residence within reservations. Moreover, some States assumed jurisdiction over criminal offenses and civil disputes occurring there, or did so in part (*e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979)), and, in some cases, accepted other responsibilities as well (*e.g.*, *Montana* v. *United States*, 450 U.S. 544 (1981)).

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[6] In *Kagama*, the Court gave the Indian Commerce Clause a perhaps unduly narrow construction. 118 U.S. at 378-379. But that was in the context of sustaining a federal criminal statute that punished offenses committed by one Indian against another "without any reference * * * to any kind of commerce." *Id.* at 379. Yet, the Court was clear that Congress was authorized to enact the Major Crimes Act, in part because the States lacked any comparable power. *Id.* at 383-385.

Unquestionably, these developments have changed the map and complicated the legal situation. Indeed, had the allotment policy and the later termination program been carried to the end, Indian enclaves would have ceased to exist and Indian "tribes" would have lost their separate status. In that event, the Indian Commerce Clause, although unrepealed, would have lost its bite, for lack of any subject matter.

3. But, as is well known, the direction was reversed, both in the mid-1930's and, again, in the mid-1960's, and no irrevocable destruction of Indian tribes occurred. As this Court has stressed, "allotment * * * is completely consistent with continued reservation status" (*Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973)), and Public Law 280 did not "effect total assimilation" and convert "the affected tribes into little more than 'private, voluntary organizations'" (*Bryan* v. *Itasca County*, 426 U.S. 373, 387-388 (1976), quoting from *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)). Moreover, for a decade at least, the express policy of the United States has been to foster tribal self-government and self-sufficiency. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 388-389 n.14. It hardly needs saying that this Court has generously accepted that political decision, emphatically declaring the continuing identity of Indian tribes, with a limited, but significant, residual sovereignty over both their members and their territory. *E.g.*, *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 152-154; *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142, 151; *Merrion* v. *Jicarilla Apache Tribe*, *supra*, slip op. 7-18.

In these circumstances, we do not appreciate how it can be said that the Indian Commerce Clause has lost its force. The geographical scope of the provision has been cut down. And it no longer maintains an absolute wall around Indian enclaves. But that is true only because, and to the extent, that Congress has invited State law to enter. That the Legislative Branch has opened doors in the wall for limited purposes is no pretext for ignoring

the boundary altogether, especially when Congress itself has repudiated its former policy. As this Court has stressed, "when Congress has wished the States to [regulate the affairs of Indians on a reservation] it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied." *Williams* v. *Lee*, *supra*, 358 U.S. at 221; see also *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 389-390. Now, as before, the congressional assumption is that State authority within Indian reservations is lacking absent express federal legislation conferring such power. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 175 & n.13, 177-178 (1973). In our view, that approach is faithful to the Constitutional arrangement reached two centuries ago and still relevant today.

D.

To say that the Indian Commerce Clause remains alive and well does not, of course, mean that, of its own force, it must today be deemed to grant an "automatic" exemption from State regulation or taxation for all activities touching Indian interests—except as Congress has expressly provided otherwise. It is no affront to the constitutional principle that Indian affairs are, in the first instance, an exclusive federal concern, to concede State jurisdiction over non-Indians who commit crimes against each other within the boundaries of a reservation, or who choose that locale to engage in commercial dealings with each other. Nor does it offend the Indian Commerce Clause to permit the State to tax its non-Indian citizens residing within an Indian reservation in respect of their fee lands or their personal property or income not directly traceable to Indian transactions. After all, the Clause reaches only "commerce . . . *with* the Indian Tribes."

Nor is it necessary to extend the umbrella of the Indian Commerce Clause beyond reservation boundaries. It is reasonable to view the Clause as focusing on what used to be known as "Indian country," which is today

effectively the diminished area of Indian reservations. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), teaches that even tribal income from off-reservation enterprises is not exempt from State taxation. And, finally, we must accept that a reservation situs is not always sufficient to immunize the transaction, if that nexus is no more than a device to avoid taxation. *Washington* v. *Confederated Tribes*, *supra*.

But on-reservation activities or transactions significantly involving the resident tribe, it seems to us, *are* sheltered from State interference by the Indian Commerce Clause—or, at least, presumptively so. Thus, in the present case, it seems plain the State has no jurisdiction over the building of the Navajo school, or the contracts involved. Even if there were no governing federal regulations, we do not suppose New Mexico could assert that its zoning laws, or its building code, or its contract law, were applicable to this activity. And that would be true even if the "legal incidence" of regulation fell on the non-Indian contractor, rather than the Indian school board. The reason, of course, is that the Indian Commerce Clause exempts from State regulation the *whole* activity or transaction, not merely the Indian partner.

In our view, no different result is required because New Mexico is asserting *taxing* power, which is more easily focused on one party to a contract. After all, the State is in no way involved: its laws are not implicated, its officials are performing no role. Yet, although contributing nothing to the transaction, the State is seeking to exact a price. In sum, our submission is that, regardless of actual federal regulation, when a transaction with tribal Indians is off-limits to the State, it can no more tax it than regulate it.

This much, we believe, is mandated by the Indian Commerce Clause. Within this restricted sphere, the Clause still protects Indian commerce from State interference. Of course, Congress remains free to relinquish its monopoly of power to regulate white-Indian relations

to the States, and, in significant respects, it has done so. But, except as legislation can be shown to have worked such a transfer, or the Tribes, by assimilation or otherwise, have surrendered the benefit of the Nation's special protection, the constitutional rule must remain the same. It can hardly be admitted that the Indian Commerce Clause has lost its shielding force because intervening events have suggested a different solution, or because this Court has been shy about invoking it.

For the reasons stated here and in our opening brief, the judgment of the New Mexico Court of Appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

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